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No.

In The

Supreme Court of the United States

October Term, 1986

LOUIS GNIOTEK, CARMEN CHRISTY, LEONARD GARRIS, DAVID SOFRONSKI, AUGUSTINE PESCATORE, and FRATERNAL ORDER OF POLICE, LODGE NO. 5,

Petitioners,

vs.

CITY OF PHILADELPHIA, W. WILSON GOODE, LEO BROOKS, GREGORE J. SAMBOR, ANDREAS HANTWERKER, JOHN STRAUB and BARBARA MATHER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT B. MOZENTER
Attorney for Petitioners
1411 Walnut Street
Suite 600
Philadelphia, Pennsylvania 19102
(215) 568-4630

ANTHONY J. MOLLOY, JR.
JANE R. GOLDBERG
Of Counsel

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a permanent civil service employee of the City of Philadelphia, ordered to appear for questioning by his Police employer, advised he was a target of a criminal investigation and read his *Miranda* warnings and separated from employment immediately after asserting the privilege against self-incrimination, was accorded a meaningful due process opportunity to respond.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Louis Gniotek, Carmen Christy, Leonard Garris, David Sofronski, Augustine Pescatore and Fraternal Order of Police, Lodge No. 5, the petitioners herein, pray that a Writ of Certiorari

issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in the above entitled case on December 24, 1986.

OPINIONS BELOW

1. The opinion and judgment of the United States Court of Appeals for the Third Circuit affirming the District Court order, dated and entered December 24, 1986, is printed in the Appendix, *infra*, at 1a. It is officially reported at 808 F. 2d 241.

2. The opinion and order of the District Court, dated March 7, 1986, granting respondents' motion for summary judgment in connection with petitioners' procedural due process and Fifth Amendment claims and dismissing the complaint, is printed in the Appendix, *infra*, at 12a. It is officially reported at 620 F. Supp. 827.

JURISDICTION

1. The judgment of the United States Court of Appeals for the Third Circuit was made, entered and filed on December 24, 1986.

2. The time for filing this petition does not expire until March 23, 1987.

3. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments of the Constitution of the United States; 42 U.S.C. § 1983; § 17 of the Pennsylvania

Civil Service Regulations; §§ 7-303 and 7-401(p) and (q) of the Philadelphia Home Rule Charter, are printed in the Appendix, *infra*, at 85a.

STATEMENT OF THE CASE

Petitioners brought suit against the City of Philadelphia, the Mayor of Philadelphia and other individuals seeking reinstatement, backpay, compensatory and punitive damages, and equitable relief based on their dismissals as Philadelphia Police Officers. The gravaman of the complaint was the deprivation of petitioners' property rights in their employment and pension benefits without due process of law and the termination of their employment for the lawful exercise of their Fifth Amendment privilege against self-incrimination.

The action was filed on October 26, 1984. Respondents filed a motion to dismiss or for summary judgment on May 9, 1985. Petitioners filed their cross-motion for summary judgment on June 4, 1985, and *Amicus Curiae*, American Civil Liberties Foundation, filed its memorandum of law in support of petitioners' cross-motion on June 6, 1985.

On March 7, 1986, the District Court denied petitioners' motion in all respects and granted respondents' motion. The District Court concluded, *inter alia*, that petitioners were lawfully dismissed for just cause, that petitioners were not discharged for invoking the Fifth Amendment, that petitioners' dismissals complied with the due process requirements for public employees, that no relief could be granted petitioners under 42 U.S.C. § 1985, that petitioner Fraternal Order of Police had standing, and that petitioners' claim regarding the deprivation of their pension benefits was not ripe for adjudication. In particular, with respect to whether the petitioners' dismissals complied with the dictates of due process, the District Court (a) implied without explicitly

stating that a suspension prior to dismissal in which all the benefits of employment were lost, and which benefits could be reinstated only upon the successful prosecution of a post-deprivation appeal, required the same due process protections as an outright dismissal, and (b) held by necessary implication that a criminal interrogation of a public employee, who was not granted use immunity for statements made therein, could satisfy the pretermination requirement of *Cleveland Board of Education v. Loudermill*, ____ U.S. ____, 105 S. Ct. 1487 (1985).

Petitioners filed a timely appeal to the Third Circuit Court of Appeals in which the American Civil Liberties Foundation joined. The appeal raised significant issues regarding the right of tenured public employees to due process prior to the termination of their employment, as well as their right to remain silent during a criminal investigation in which they are targets, without fear of penalty.

The Third Circuit held that petitioners were entitled to pretermination procedures when they were suspended with intent to dismiss from their positions as Philadelphia Police Officers. However, the Court went on to state that each petitioner received adequate notice under the due process clause when he was ordered to report to the Ethics Accountability Division of the Philadelphia Police Department with his commanding officer and to bring his badge, gun and other equipment; and, having reported, was informed that he had been named in a federal corruption trial as the recipient of a bribe and was, therefore, the target of a criminal investigation. Although no advance notice was given to any of the petitioners, the Court concluded that the due process requirement of timely and sufficient notice was met.

The Third Circuit further held that petitioners had an adequate opportunity to respond although, when, upon reporting to Ethics Accountability Division, each was given his *Miranda*

warnings and, upon advice of counsel, invoked his privilege against self-incrimination. Immediately after declining to make a statement, each petitioner was suspended with intent to dismiss, relieved of his equipment and severed from the payroll of the Philadelphia Police Department. The Third Circuit concluded that since petitioners were given an opportunity to respond at the time each was given his *Miranda* warnings, respondents neither burdened their privilege to remain silent under the Fifth Amendment nor violated their right to due process under the Fourteenth Amendment. In fact, respondents departed from the normal custom and practice of the Philadelphia Police Department in violation of Pennsylvania Civil Service Regulations and the Philadelphia Home Rule Charter.

After they had been informally suspended with intention to dismiss, petitioners, with the exception of Stansfield, received a copy of a Statement of Charges Filed and Action Taken—a listing of violations of the Police Department Disciplinary Code of which they stood accused. In response to these departmental charges, petitioners Gniotek, Christy, Pescatore and Sofronski pled not guilty and requested a hearing.

Shortly after petitioners were served with these disciplinary charges, to which they pled not guilty and requested a hearing, they were served with a Notice of Intention to Dismiss bearing the designation "C.D.A."—Commissioner's Direct Action—finding them guilty of the charges preferred against them. Based upon these findings, the police commissioner *formally* suspended them, making this suspension retroactive to the date that they were interrogated by the Ethics Accountability Division, read their *Miranda* rights, asserted these rights and immediately suspended.

In response to the actions taken by the Philadelphia Police Department, each of the petitioners filed a grievance with the police commissioner challenging the actions taken against them

under the just cause standard of the collective bargaining agreement which incorporates by reference the discipline standards of the Philadelphia Home Rule Charter and Civil Service Regulations. These grievances have been pursued through arbitration before Eli Rock, Esquire, the arbitrator designated by the American Arbitration Association. Arbitrator Rock directed the reinstatement of petitioners Gniotek and Sofronski with backpay. The discharges of petitioners Garris, Pescatore and Christy were sustained. However, the arbitrator specifically did not address the procedural due process issues and the other constitutional issues pending before the District Court.

REASON FOR GRANTING THE WRIT

I.

Custodial interrogation of a criminal target by a police employer cannot be deemed a meaningful due process opportunity to respond because it impermissibly conditions the exercise of the Fifth and Fourteenth Amendment due process guarantees upon the waiver of the Fifth Amendment privilege against self-incrimination.

The case at bar involves a Third Circuit decision concerning the predeprivation due process rights of tenured police employees of the City of Philadelphia that clearly violates the uniform precedent of this Honorable Court, not only with respect to due process, but also with respect to the exercise of the privilege against self-incrimination guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution. Petitioners seek certiorari to address this decision of the Third Circuit because it impermissibly and improperly creates legal distinctions between the decisions of this Honorable Court in *Garrity v. New Jersey*, 385 U.S. 78 (1970) and *United States v. Rylander*, 460 U.S. 752 (1983).

The narrow legal issue presented to the Third Circuit by petitioners' § 1983 action was whether they, as permanent civil service employees of the City of Philadelphia, were deprived of their property interest in employment when they were suspended without pay pending discharge. This issue involving the application of this Honorable Court's determination in *Cleveland Board of Education v. Loudermill*, ____ U.S. ____, 105 S. Ct. 1487 (1985), related to the following undisputed factual sequence outlined in paragraph 2 of the Court's decision as follows:

> 2. The next day Inspector Hantwerker executed a "Notice of Suspension with Intent to Dismiss" for each officer. He then summoned the officers to appear at EAD headquarters. Each officer appeared with counsel, and each was called in individually to the inspector's office. Hantwerker *advised each officer that he had been identified in federal court testimony as the recipient of bribes and that he was the subject of a criminal investigation.* Each was given his *Miranda* warnings and was asked if he wished to make a statement. On advice of counsel each chose to remain silent.[2] Thereupon, Hantwerker gave each his "Notice of Suspension with Intent to Dismiss" effective immediately, with suspension to be without pay and to last for 30 days or until dismissed.
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>
> 2. One appellant requested his "Charter Rights" which, in essence, is a request for use immunity. The request was denied.

Appendix, *infra*, at 3a. (Emphasis added.)

The Third Circuit reversed the District Court determination that the petitioners were accorded their right to due process when

they received formal Notice of Intention to Dismiss specifying the violations of the Police Department Disciplinary Code of which they stood accused (paragraph 8 of the Court's decision). After deciding that the petitioners were entitled to due process at the time they were suspended pending dismissal, the Court concluded that the reading of their *Miranda* rights adequately notified petitioners of evidence supporting the discharge action by their police employer. However, the Third Circuit thereafter addressed the issue of meaningful opportunity to respond, concluding under the circumstances at bar, a criminal investigation, that reliance upon the privilege against self-incrimination was not a "substitute for relevant evidence" to rebut the discharge evidence presented to them by their police employer and that being placed in the position of asserting the privilege against self-incrimination or responding to the evidence concerning the dismissal action created no Fifth Amendment dilemma relying upon *Williams v. Florida, supra; United States v. Rylander, supra.* In relying upon *Williams v. Florida, supra*, the Third Circuit specifically rejected the application of this Court's decisions in *Garrity v. New Jersey, supra*, and its progeny, dismissing petitioners' argument that forcing a person to waive his Fifth Amendment privilege against self-incrimination in order to exercise his Fifth Amendment due process rights creates an impermissible constitutional dilemma.

Petitioners submit to this Honorable Court that, contrary to the Third Circuit's decision, there is no distinction between *Williams v. Florida, supra; United States v. Rylander, supra;* or *Garrity v. New Jersey, supra.* As will be established *infra*, these cases are totally consistent and involve this Court's balancing of the individual's privilege against self-incrimination against the government's right of legitimate inquiry; *i.e.*, when the Fifth Amendment privilege becomes a sword thwarting legitimate inquiry as opposed to a shield against self-incrimination.

In making its distinction between *Rylander, supra* and *Garrity,*

supra, the Third Circuit totally disregarded its own factual finding. When petitioners were ordered to report to Inspector Hantwerker, they were not being requested to account for the performance of their public duties, they were being apprised that they were targets of a criminal investigation. The so-called interview conducted by Inspector Andreas Hantwerker was not a routine, non-custodial, administrative investigation noted by the Supreme Court of Pennsylvania in *Commonwealth v. Ziegler*, 470 A. 2d 56 (1983), where no *Miranda* warning need be given. The interview by Inspector Hantwerker was, by the Police Department's own admission, a custodial interrogation of a criminal target.

In footnote 2 of its decision, the Third Circuit specifically noted that one of the appellants before it sought his "Charter Rights" when read his *Miranda* warnings. The *Miranda* statement of Police Officer Schwartz referred to in footnote 2 of the Court's opinion was prefaced by Inspector Hantwerker as follows:

> On November 9, 1984, you were questioned by Capt. Burns and Sgt. Lupinetti of the Ethics Accountability Division regarding practices and procedures in Northeast Police Division. At that time you were not the target of a criminal investigation, and were, therefore not given criminal warnings. You are here today to give a more indepth statement concerning your activities in Northeast Police Division. Since your last statement, your former partner, George Bowie, has testified under oath on behalf of the Federal Government, implicating you in criminality while serving in Northeast Police Division. *Because you now are the target of a criminal investigation, and are receiving the same rights and privileges of any citizen, you will be given Miranda warnings today.*

Appendix, *infra*, at 68a. (Emphasis added.)

Paraphrasing the decision of this Honorable Court in *Uniformed Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 280, 284 (1968), the Philadelphia Police Department was not seeking "an accounting of their use or abuse of their public trust, but testimony from their own lips which . . . could be used to incriminate them." Moreover, the Circuit Court's passing reference to the term "Charter Rights" requested by Police Officer Schwartz similarly disregards the "proper proceedings" for compelled response addressed by this Honorable Court in *Uniformed Sanitation Workers, supra.*

A Charter Warning Statement (Appendix, *infra*, at 96a) advises an officer that he must answer narrow questions related to job performance under penalty of discipline; however, the police department does not use this statement or the fruits thereof in a criminal prosecution. This is a compelled accounting of job performance under penalty of employment sanction by operation of law, *Garrity, supra.* In the present case, the City refused to conduct a *Garrity* interview. To the contrary, as stated by John Straub, Esquire, who was both a city solicitor and deputy district attorney, immunity would be discussed "in return for your cooperation." (Appendix, *infra*, at 70a.)

In the Charter Warning/*Garrity* statement situation, immunity is implied by law because of employment coercion; however, the use immunity offer expressed by Mr. Straub was judicially approved immunity after a proffer by petitioners approved by the district attorney. This judicial immunity is clearly not the proper proceeding outlined by this Court in *Uniformed Sanitation Men, supra* but represents a total repudiation of any possibility of responding without waiving the privilege against self-incrimination.

The posture of the Philadelphia Police Department at the time petitioners were separated from employment was exclusively that of prosecutor. When petitioners were ordered to appear before Inspector Hantwerker, their separation papers were already prepared. If a meaningful opportunity to respond to charges before discipline were contemplated, a *Garrity* interview should have been conducted before the imposition of discipline. In such a situation, the employee's privilege against self-incrimination and due process rights are protected and City employer's right to inquire about performance would also be protected. However, in the case at bar, the police commissioner did not choose to proceed on both a civil and criminal level; rather, he proceeded criminally, thereby precluding petitioners from responding.

The record before the courts below established that the investigative procedure utilized by the police commissioner with respect to the petitioners was totally different from the investigative procedures normally utilized by the police department where the questions of possible criminality and employee misconduct are involved.

The petitioners herein were named as bribe recipients by persons testifying as prosecution witnesses for the United States Attorney in the Hobbs Act/RICO conspiracy trials of other police officers, an allegation that would involve criminality as well as conduct unbecoming a police officer. The testimony of both Inspector Hantwerker (Appendix, *infra*, at 75a.) and City Solicitor John Straub (Appendix, *infra*, at 72a) is that the police department's procedure in such dual criminal/misconduct cases is to initially notify the police officer that he or she faces potential criminal liability through *Miranda* warnings, taking no statement. Thereafter, the police department conducts its investigation, submitting the results thereof to the district attorney who either approves arrest on criminal charges or declines prosecution. If prosecution is authorized, the officer is contacted, again read his

Miranda warnings, dismissed and arrested. If prosecution is declined, the officer is directed to report for questioning, read Charter Warnings and, thereafter, questioned as part of the investigation. Mr. Straub also noted that the Charter statement is not taken unless the district attorney has decriminalized the inquiry giving him the full opportunity to respond prior to the completion of the investigation.

Petitioners were not treated in conformity with the police department's standard investigative procedures. They were treated as the Federal Corruption Probe exceptions to standard procedure. While an officer who was alleged to have used excessive force—criminal assault—would be given *Miranda* notice, a district attorney's prosecutorial review of a criminal/civil investigation and either be charged criminally or permitted to give a *Garrity* interview before discipline, petitioners were simply notified through *Miranda* warnings that they were criminal targets and fired. The total departure from standard procedure was noted by Mr. Straub, who advised Officer Schwartz that at this stage of the investigation, it was encumbent to give *Miranda* warnings (Appendix, *infra*, at 69a), and further testified that at the time petitioners were interviewed, things were not clear "because of the pending criminal investigation."

The petitioners submit that it is precisely this action by the police commissioner—advising them that they were criminal targets as part of a custodial interrogation in a pending criminal investigation—that is totally inconsistent with the uniform precedent of this Court under the Fifth and Fourteenth Amendments. Specifically, in *United States v. Rylander, supra*, this Court was addressing the issue of civil contempt for the failure of a corporate officer to produce corporate financial data and specifically noted that Rylander personally was no longer being required to testify about these records (460 U.S. 760). Similarly, in *Williams v. Florida*, this Court stated that Florida's alibi

disclosure rule does not violate the privilege against self-incrimination.

Petitioners submit to this Court that had the City complied with the normal investigative procedures applicable to all other mixed criminal/employment misconduct inquiries, they would not have filed an action. However, the City totally departed from procedure, firing petitioners prior to the conduct of any criminal inquiry, advising them only that they were targets at a custodial interrogation. In fact, petitioners agree with the Third Circuit's adoption of the decision of the Illinois District Court in *United States v. One 1985 Plymouth Colt*, 664 F. Supp. 1546, 1552-53 (N.D. Ill., 1986), where the Court, addressing the forfeiture stage in a proceeding under the Controlled Substances Act, stated as follows:

> That situation was paralleled earlier in this action, when the government sought incriminating information from Taylor via interrogatories. This Court stayed discovery to preclude the government from doing so. Had that rendered the government unable to meet its burden of showing probable cause in this forfeiture suit, this Court would have had to confront the possible dismissal dealt with in *U.S. Currency*. But *Rylander* controls the entirely different posture of this case now, coming after the government has established probable cause through its own investigative efforts. Under these circumstances the earlier-quoted language from *Rylander* becomes directly apropos.
>
> This is not to say this Court could not attempt to accommodate Taylor's interest against self-incrimination so long as (in *Rylander* terms) he did not "convert the privilege from (a) shield . . . into a sword . . ."

Had the City followed its standard procedures, it would have conducted its own investigation as did the government in *One 1985 Plymouth Colt, supra.* Once this was accomplished and the district attorney made a prosecutorial determination, petitioners would have either been charged criminally or cleared—the former situation creating the *Rylander* situation where petitioners would not be able to use the privilege against self-incrimination as a sword, or the latter when the question of self-incrimination had been rendered moot by a declination of prosecution. However, the City never placed itself in this position; rather, it stayed at the interrogatory stage, seeking incriminating evidence from the mouths of petitioners and discharged them immediately after the assertion of the privilege against self-incrimination.

The *Rylander* prohibition against the use of the privilege against self-incrimination is directly consonant with *Garrity, supra.* The question of whether the privilege is a shield or a sword is a question balancing the individual's interest versus governmental interest. This same balance test was noted in *Garrity, supra,* between the privilege against self-incrimination versus the obligation to account performance of a public office. Similarly, it is the balance recognized in *Loudermill, supra,* between the private interest in retaining employment and the governmental employer's interest in removing an unsatisfactory employee, recognizing the obvious value of permitting the employee to tell his side of the story in reaching an accurate decision (105 S. Ct. 1494).

In the present case, the Third Circuit reached the conclusion that petitioners received constitutional due process because there is "no defect when one must opt between speaking at an employment termination hearing and asserting the Fifth Amendment privilege." This decision totally ignores the fact that what the Court deemed a hearing was custodial interrogation, as evidenced by the City's issuance of *Miranda* warnings and the

City's complete refusal to utilize proper procedures to permit petitioners an opportunity to respond without penalizing their exercise of their privilege against self-incrimination, *Uniformed Sanitation Men, supra.*

Similarly disregarded and misapprehended by the Court below is the principal of *Rylander, supra*, and *One 1985 Plymouth Colt, supra*, that while it is bad faith for an individual to assert the privilege against self-incrimination as a sword to thwart legitimate government inquiry, it is equally bad faith for the government to use an ostensibly civil procedure to ferret information in order to gather information for a criminal inquiry, *United States v. LaSalle National Bank*, 437 U.S. 298 (1978). In the present case, the Third Circuit has sanctioned bad faith by permitting a custodial interrogation—identifying petitioners as criminal targets in an incipient criminal investigation, when the police department, as an institution, has committed itself solely to criminal prosecution—to serve as an employment termination hearing.

The bad faith sanctioned by the Court's decision at bar and its violation of *Loudermill, supra*, is further shown in the post deprivation proceedings before Arbitrator Eli Rock, which amplified on the record before the District Court. In this proceeding, the sum total of the criminal inquiry conducted by the City was to read petitioners their *Miranda* rights as criminal targets and terminate them. In the arbitration decision, the arbitrator upheld the discharges of petitioners Christy, Pescatore and Garris, noting, *inter alia* (Appendix, *infra*, at 62a), that they made no response to the formal charges filed against them—after their separation with *Miranda* warnings. Similarly noted was the absence of any investigation and, in fact, the supplemental arbitration decision on petitioners Gniotek and Sofronski in August 1986 reflects the failure/inability of the City to produce the witnesses whose testimony precipitated their discharges as criminal targets two (2) years earlier.

Petitioners, at the time of dismissal and at all times thereafter, were targets of a criminal investigation that never took place. Their assertion of their privilege against self-incrimination in a criminal interrogation was the subject of negative inference by the arbitrator in a post deprivation due process procedure tainted by the bad faith action of their police employer in a total departure from its uniform due process investigatory procedures, conditioning their right to a meaningful opportunity to respond upon a waiver of their privilege against self-incrimination.

CONCLUSION

In view of the foregoing considerations, the petitioners respectfully submit that this petition be granted.

Respectfully submitted,

ROBERT B. MOZENTER
Attorney for Petitioners

ANTHONY J. MOLLOY, JR.
JANE R. GOLDBERG
Of Counsel

APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1175

GNIOTEK, LOUIS; CHRISTY, CARMEN; GIOFFRE, JOSEPH; PESCATORE, AUGUSTINE; GARRIS, LEONARD; FRATERNAL ORDER OF POLICE, SULLIVAN, EUGENE; SOFRONSKI, DAVID; SCHWARTZ, ROBERT; STANSFIELD, ROBERT,

Appellants

vs.

CITY OF PHILADELPHIA, GOODE, WILSON W., MAYOR; CITY OF PHILADELPHIA, BROOKS, LEO; MANAGING DIRECTOR, CITY OF PHILADELPHIA, SAMBOR, GREGORE J.; POLICE COMMISSIONER, CITY OF PHILADELPHIA, HANTWERKER, ANDREAS; INSPECTOR ETHICS AND ACCOUNTABILITY DIVISION, PHILADELPHIA POLICE DEPARTMENT, STRAUB, JOHN ESQ.; ASSISTANT CITY SOLICITOR; POLICE COUNSEL, CO-COMMANDER ETHICS AND ACCOUNTABILITY DIVISION, PHILADELPHIA POLICE DEPARTMENT, MATHER, BARBARA; SOLICITOR, CITY OF PHILADELPHIA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil No. 84-5242

Appendix A

Argued November 17, 1986

Before: SEITZ, GIBBONS, and HUNTER,
Circuit Judges

Opinion filed December 24, 1986

Anthony J. Molloy, Jr. (Argued)
Robert B. Mozenter
Mozenter, Molloy & Durst
1411 Walnut Street, Suite 600
Philadelphia, PA 19102
Attorneys for Appellants

Jesse Milan, Jr. (Argued)
Chief Assistant City Solicitor Ralph J. Teti
Divisional Deputy City Solicitor
1500 Municipal Services Building
Philadelphia, PA 19102
Attorneys for Appellees

Adam Thurschwell
Kairys & Rudovsky
1425 Walnut Street
Philadelphia, PA 19102
Counsel for Amicus Curiae
American Civil Liberties Foundation
on behalf of Appellants

Appendix A

OPINION OF THE COURT

HUNTER, *Circuit Judge:*

1. This case arises out of events surrounding the 1984 Philadelphia Police Corruption trials. In those two trials, *United States v. Martin* and *United States v. Volkmar,* government witnesses identified appellants who were then officers in the Philadelphia Police Department, as recipients of unlawful bribes. The two trials were monitored by investigators for the Philadelphia Police Ethics Accountability Division ("EAD"). When the witnesses identified the officers, the EAD investigators immediately reported the witnesses testimony to the Police Commissioner and to the commanding officer of the EAD, Inspector Andreas Hantwerker.[1] Thereupon, the Commissioner instructed Inspector Hantwerker to interview each officer.

2. The next day Inspector Hantwerker executed a "Notice of Suspension with Intent to Dismiss" for each officer. He then summoned the officers to appear at EAD headquarters. Each officer appeared with counsel, and each was called in individually to the Inspector's office. Hantwerker advised each officer that he had been identified in federal court testimony as the recipient of bribes and that he was the subject of a criminal investigation. Each was given his *Miranda* warnings and was asked if he wished to make a statement. On advice of counsel each chose to remain silent.[2] Thereupon, Hantwerker gave each his "Notice of

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1. Appellants Gniotek, Christy, Garris and Pescatore were identified on July 19, 1984. Appellants Stansfield and Sofronski were identified on November 14, 1984. The scenarios as to each appellant were identical, however.

2. One appellant requested his "Charter Rights" which, in essence, is a request for use immunity. The request was denied.

Suspension with Intent to Dismiss" effective immediately, with suspension to be without pay and to last for 30 days or until dismissal.

3. Four days later the officers were served "Notices of Intention to Dismiss" which specified the charges against each officer and which stated that if the recipient thought that dismissal was unjustified he had, under the regulations of the Civil Service Commission, ten days to submit to the Commissioner his reasons in support of his belief that dismissal was unjustified. None of the officers exercised his right to make a submission within ten days. Each was officially dismissed when the ten day period expired.

4. All six appellants lodged grievances with the Police Commissioner challenging the dismissals. The grievances were submitted to arbitration. The arbitrator ruled that three of the officers were dismissed with just cause and that two were not. One case is still pending.

5. In April, 1985, the Fraternal Order of Police, the individual appellants herein, and three other officers who do not participate in this appeal filed suit in United States District Court for the Eastern District of Pennsylvania against the City of Philadelphia and various city officials (hereinafter collectively referred to as "the city"). They alleged, *inter alia,* that the manner in which they were dismissed from the police force constituted violations of their rights to due process and equal protection, and violated the fifth amendment's prohibition of compelled self-incrimination. The district court granted defendants' motion for summary judgment on all claims. *Gniotek v. City of Philadelphia,* 630 F. Supp. 827 (E.D. Pa. 1986). On appeal, only the due process and self-incrimination claims are pressed. We have jurisdiction pursuant to 28 U.S.C. § 1291 (1982).

Appendix A

DISCUSSION

6. The only due process issue in this case is whether appellants received adequate predeprivation hearings. All parties agree that appellants have a cognizable property interest in their jobs and that the City of Philadelphia provides adequate post-deprivation remedies.[3]

7. In *Cleveland Bd. of Educ. v. Loudermill*, ____ U.S. ____, 105 S. Ct. 1487 (1985), the Supreme Court held that when threatened with dismissal, a public employee with a property interest in his job is entitled to "a pretermination opportunity to respond, coupled with post-termination administrative (or judicial) procedures." *Id.* at 1496. The predeprivation hearing need not be elaborate, but it is necessary, even if extensive post-deprivation remedies are afforded.[4] *Id.* at 1495. Prior to deprivation "[t]he tenured public employee is entitled to notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.*

8. The district court held that appellants received adequate predeprivation hearings. However, the district court deemed that the deprivation occurred when appellants were officially dismissed,

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3. Appellants assert, however, that inadequacies in their predeprivation hearings "tainted their post-deprivation due process rights." Appellants' Brief at 33. Because we will hold that the predeprivation hearings were adequate, we need not address this contention. The adequacy of the post-deprivation hearings is otherwise unchallenged.

4. Thus, *Loudermill* supersedes our decision in *Cohen v. City of Philadelphia*, 736 F.2d 81 (3d Cir.), *cert. denied*, 469 U.S. 1019 (1984). *See Stana v. School Dist. of City of Pittsburgh*, 775 F.2d 122, 130 (3d Cir. 1985); *Brown v. Trench*, 787 F.2d 167, 171 (3d Cir. 1986).

not when they were suspended without pay. *Gniotek,* 630 F. Supp. at 834. Thus, the court held that the 10 day opportunity to respond in writing which the appellants were given (and which the Civil Service regulations require) constituted adequate predeprivation hearings. Appellants urge, however, that the suspensions with intent to dismiss were *de facto* dismissals and the deprivation, therefore, occurred when they were suspended, *i.e.,* before they were given 10 days to respond.[5] The appellants' argument has merit. The Fifth Circuit addressed a similar argument in *Thurston v. Dekle,* 531 F.2d 1264 (5th Cir. 1976), *vacated on other grounds,* 438 U.S. 901 (1978). *Thurston* involved a tenured public employee who was suspended for thirty days without pay, and the suspension automatically became a termination if the employee failed to successfully appeal the suspension within the 30 days. The Fifth Circuit held that the suspension was the functional equivalent of permanent discharge subject to a condition subsequent; therefore, the employee threatened with suspension "was entitled to the same predeprivation process required when an employee is threatened with discharge." At least one district court in this circuit has accepted the reasoning of *Thurston. See Hopkins v. Mayor & Council of Wilmington,* 600 F. Supp. 542 (D. Del. 1984) (due process violation when policeman is suspended without pay after being arrested for drug possession). The *Thurston* rule prevents the government employer from circumventing the predetermination hearing requirement, and we adopt it here. Accordingly, we hold that before appellants were suspended with intent to dismiss they were entitled to whatever pretermination procedures the Constitution mandates prior to actual dismissal.

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5. It should be noted further that under Pennsylvania law, suspensions, like dismissals are only proper when for just cause; therefore appellants had a separate property interest in not being suspended.

Appendix A

9. Our inquiry, therefore, is narrowed to the question whether the interviews that the individual appellants had with Inspector Hantwerker were sufficient, under *Loudermill,* to discharge the city's duty to provide pretermination hearings. The adequacy of any hearing must be evaluated in reference to the "two essential requirements of due process, . . . notice and an opportunity to respond." *Loudermill,* 105 S. Ct. at 1495. We will examine separately these two essential requirements.

A. *Notice*

10. Notice is sufficient, 1) if it apprises the vulnerable party of the nature of the charges and general evidence against him, and 2) if it is timely under the particular circumstances of the case. *See id.*; and *see Goss v. Lopez,* 419 U.S. 565 (1975). We believe that the notices served to appellants satisfied both of these requirements.

11. We first examine the content of the notices. During the interviews with Inspector Hantwerker, each appellant was given a form containing a summary of the evidence against him and containing a recitation of the *Miranda* rights. Each appellant, before being suspended, signed the form applicable to him. Appellant Gniotek's form, for instance, stated:

> I am Inspector Andreas Hantwerker, this is Deputy City Solicitor John Straub and your C.O., Captain Joseph Stine.
>
> We are questioning you concerning testimony presented in Federal Court under oath by Eugene Boris an admitted number writer, that he paid you $60 per month for an extended period beginning

in 1982 for protection of his illegal activities.

This statement, clearly, gave Gniotek notice of the charges and nature of evidence against him. It was of such specificity to allow Gniotek the opportunity to determine what facts, if any, within his knowledge might be presented in mitigation of or in denial of the charges. We find that under the standards enunciated in *Loudermill*, this notice satisfied the demands of due process. We have also examined the notices given to the other appellants. Though different in detail from the notice given to Gniotek, they are similar in degree of specificity. Accordingly, we hold that they are not constitutionally defective.

12. Having found that the notices are not lacking in content, we now must determine if they were timely served. Here, appellants received notice at the hearing itself; no advance notice was given. Lack of advance notice, however, does not constitute a *per se* violation of due process. *See, e.g., Goss,* 419 U.S. at 582 (In the case of a student's suspension from school, "[t]here need be no delay between the time 'notice' is given and the time of hearing."). Indeed, the First Circuit recently indicated that in the employee termination context, notice served at the predeprivation hearing satisfies the demands of due process. *Brasslett v. Cota,* 761 F.2d 827, 836 (1st Cir. 1985).

13. We agree with the First Circuit that advance notice is not required. "[T]he timing and content of notice . . . will depend on appropriate accommodation of the competing interests involved." *Goss,* 419 U.S. at 579. In *Loudermill,* the Supreme Court attempted to accommodate the government's interest in quickly removing an unsatisfactory employee with the employee's interest in retaining employment. The balance was struck by allowing the government to dismiss the employee after only a

compressed hearing and by guaranteeing to the employee "an opportunity to present his side of the story" followed by a prompt and complete post-termination hearing. In the circumstances of this case, advance notice was not necessary to enable the employee to present his story and would have burdened the government's interest in quickly suspending an unsatisfactory employee. The balance has been struck by the Supreme Court in *Loudermill,* and imposing an advance notice requirement would, we feel, tip the scales in this case. We therefore conclude that the appellants received proper notice.

B. *Opportunity to Respond*

14. Appellants and amicus curiae, the American Civil Liberties Foundation, urge that because appellants were the subjects of a criminal investigation and because their responses in the pretermination hearings could have been used against them in a criminal action, they were not given a meaningful opportunity to respond as required by due process. They further urge that the city unconstitutionally burdened their privilege against self-incrimination because they were compelled to choose between asserting the privilege and responding.[6]

15. These contentions are meritless. The fact that the appellants had to choose whether to talk or to remain silent

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6. Appellants and amicus would have us hold that appellants were entitled to use immunity. Because we hold that appellants' rights under the fifth and fourteenth amendments were not violated, we, of course, do not find that they were entitled to use immunity at the pretermination hearings. We note, however, that an Illinois federal district court recently held that a defendant in a non-criminal proceeding is not entitled to immunity merely because he is faced with a "Fifth Amendment Dilemma." *United States v. One 1985 Plymouth,* No. 85-C-8159, slip op. (N.D. Ill. Oct. 7, 1986). We agree with that holding.

offends neither the fifth nor the fourteeneth amendment. The Supreme Court's decisions in *Williams v. Florida*, 399 U.S. 78 (1970) and *United States v. Rylander*, 460 U.S. 752 (1983) lead us to this conclusion.[7] In *Williams*, the Court observed that the decision whether to respond to the state's evidence is often a difficult one, but the fact that a choice must be made does not raise fifth or fourteenth amendment problems:

> The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses, he must reveal their identity and submit them to cross-examination which in itself may prove incriminating or which may furnish the State with leads to incriminating rebuttal. That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination. The pressures generated by the

---

7. Appellants contend that the line of cases holding that a tenured government employee cannot be dismissed solely because he asserts his fifth amendment rights is controlling here. *See Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Garrity v. New Jersey*, 385 U.S. 493 (1967). In these cases, however, the employees were dismissed not because of any evidence of bribery or other wrong-doing, but solely because they chose to assert the privilege against self-incrimination. In the present case, appellants were confronted with evidence constituting grounds for dismissal; it was then up to each appellant to rebut this evidence. Instead, each appellant stood silent. They were privileged to do so, "but the claim of privilege is not a substitute for relevant evidence." *Rylander*, 460 U.S. at 761. Appellants were therefore dismissed on the basis of the city's evidence of bribery. It is the existence of this evidence and the city's use thereof that distinguishes the present case from *Lefkowitz*, *Gardner*, and *Garrity*.

> State's evidence may be severe but they do not vitiate the defendant's choice to present an alibi defense and witnesses to prove it, even though the attempted defense ends in catastrophe for the defendant. However "testimonial" or "incriminating" the alibi defense proves to be, it cannot be considered "compelled" within the meaning of the Fifth and Fourteenth Amendments.

Williams, 399 U.S. at 83-84. Relying on *Williams,* the Court in *Rylander* held that no constitutional violation occurs when a defendant in a civil contempt proceeding is confronted with the option of offering evidence to discharge his burden of proof or of asserting his fifth amendment privilege. By remaining silent, the defendant in *Rylander* was precluded from discharging his burden of proof and therefore was subject to imprisonment for civil contempt. If there is no constitutional defect when one must choose between possible loss of freedom and self-incrimination, *a fortiori,* there is no defect when one must opt between speaking at an employment termination hearing and asserting the fifth amendment privilege.

16. In sum, appellants received all the process due them and were accorded their rights under the fifth amendment. The judgment appealed from will therefore be affirmed.

True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B—MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT DATED MARCH 7, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 84-5242

LOUIS GNIOTEK, CARMEN CHRISTY, JOSEPH GIOFFRE, AUGUSTINE PESCATORE, LEONARD GARRIS, EUGENE SULLIVAN, DAVID SOFRONSKI, ROBERT SCHWARTZ, ROBERT STANSFIELD, and FRATERNAL ORDER OF POLICE

Plaintiffs

vs.

CITY OF PHILADELPHIA, W. WILSON GOODE, LEO BROOKS, GREGORE J. SAMBOR, ANDREAS HANTWERKER, JOHN STRAUB, ESQ., and BARBARA MATHER, Solicitor

Defendants

MEMORANDUM

BRODERICK, J. MARCH 7, 1986

This is an action brought by nine former Philadelphia Police Officers and the Fraternal Order of Police ("Plaintiffs") stemming from the officers' dismissals from the Philadelphia Police

Department in the latter part of 1984. Plaintiffs claim that the civil and constitutional rights of the officers have been violated by the named defendants. The named defendants are: The City of Philadelphia, Mayor Wilson Goode, former Managing Director Leo Brooks, former Police Commissioner Gregore Sambor, Inspector Andreas Hantwerker, Assistant City Solicitor John Straub, and Solicitor Barbara Mather (hereinafter "Defendants"). Plaintiffs seek punitive and compensatory damages as well as declaratory and injunctive relief.

In 1984, the United States instituted criminal proceedings against fifteen former Philadelphia Police officers alleging various acts of police corruption. *United States v. Martin, et al.*, Cr. No. 84-106. Some defendants were severed. The first trial was held in July 1984 and the second trial was held in November 1984 under the caption *United States v. Volkmar*. During the course of these proceedings, several witnesses for the government identified the nine plaintiff police officers in this action as recipients of bribes. The plaintiff police officers were soon thereafter dismissed from the Police Department.

The defendants have filed a motion to dismiss or in the alternative for summary judgment. Plaintiffs have responded with a cross-motion for summary judgment. In addition, the American Civil Liberties Foundation ("ACLF") has filed an amicus curiae brief on the issue of the constitutionality of the suspension and dismissal procedures employed by the Philadelphia Police Department. Defendants have filed a response to plaintiffs' motion and to the ACLF's brief.

The Court will dispose of the pending motions in the following manner: The defendants' motion to dismiss the Fraternal Order of Police ("FOP") from the action on the ground that the FOP

lacks standing will be denied. The defendants' motion to dismiss plaintiffs' claim pursuant to 42 U.S.C. § 1985 for failure to state a claim will be granted. The defendants' motion to dismiss plaintiffs' claim in connection with the deprivation of their pensions will be granted. Summary judgment will be entered in favor of the defendants in connection with plaintiffs' claims that the suspension and dismissal procedures used by defendants violated the police officers' procedural due process; that plaintiff police officers' fifth amendment rights were violated by the dismissal procedures; and that they were not dismissed for "just cause."

The material facts concerning which there are no genuine issues may be summarized as follows: Prior to the events set out below, plaintiffs, except the FOP, were police officers employed by the Philadelphia Police Department. Plaintiffs Gniotek, Christy, Pescatore and Garris were named by prosecution witnesses in *United States v. Martin, et al.*, as having been the recipients of bribes for the protection of illegal activities. Specifically, government witness Eugene Boris testified that he made payments to "[a]n officer Gutak [sic] * * * He came . . . the first of the month, and I paid him." Boris further testified that he paid in increments of $60.00 over a period of time to Officer Gniotek. On the same day, Albert Ricci, the so called "bagman" of the Vice Squad for the Northwest Police Division testified that "Augustine Pescatore, Leonard Garris and myself" shared in bribe proceeds. Ricci also testified that money was distributed to other members of the Northwest Vice Squad, which consisted of Pescatore, Garris and Christy.

Plaintiff Gioffre was similarly identified in the *Martin* trial as a recipient of bribes in return for permitting illegal activities. Former Police Captain Joseph Alvaro, who was in charge of the

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Vice Squad in the Northwest Police Division, testifying for the government stated that during the period November 1982 and March 1983, Gioffre collected payments from liquor licensed establishments in return for permitting illegal activities.

On November 1, 1984, former police officer George Bowie, during the course of his entry of a guilty plea, identified plaintiff Sullivan as the recipient of bribe monies.

In the trial of *United States v. Volkmar* in November 1984, George Bowie, a prosecution witness, identified plaintiffs Schwartz and Stansfield as recipients of bribes. He testified: "I had Bob Schwartz picking up from several people, and then Bob Stansfield also." Government witness Robert Sadowl also testified that he met with plaintiff Sofronski "and discussed my business throughout the city," and that they made an agreement regarding Sadowl's video poker machines. Sadowl testified "It was $10 per location per month."

On the day after the implicating testimony was made, each of the plaintiff police officers, except Sullivan, was ordered to report to the Ethics Accountability Division of the Police Department. Each officer appeared and was called in individually with his counsel present. Each officer was advised that he had been identified in federal court testimony as the recipient of bribes in connection with the performance of his duties as a police officer and that each was the subject of a Philadelphia Police Department criminal investigation. Each officer was then given his *Miranda* warnings and was asked if he wished to give a statement. A copy of the warnings is attached as Appendix A. Each officer, on advice of his counsel, asserted his fifth amendment privilege against self-incrimination and chose to remain silent. Each officer was then given a memorandum entitled "Notice of Suspension with Intent

to Dismiss," which stated that the suspension was effective immediately. A copy of a "Notice of Suspension with Intent to Dismiss" is attached as Appendix B. Plaintiff Sullivan was served at home with the "Notice of Suspension with Intent to Dismiss" but did not receive Miranda warnings. He was, however, notified of the reasons for his suspension with intent to dismiss.

After his suspension, each plaintiff, except Sullivan and Stansfield, received a copy of a "Statement of Charges filed and Action Taken" ("Statement"). A copy of a "Statement of Charges Filed and Action Taken" is attached as Appendix C. The Statement lists the violations of the Police Disciplinary Code with which each individual plaintiff police officer was charged. Plaintiffs Gniotek, Christy, Pescatore, Gioffre, Schwartz and Sofronski signed the Statement and checked the box on the Statement marked "I Plead Not Guilty & Request a Hearing". Plaintiff Garris refused to sign the Statement.

In addition, each plaintiff police officer was served with a "Notice of Intention to Dismiss" which formally suspended each plaintiff as of the date of the initial interview with the Ethics Accountability Division. A copy of a "Notice of Intention to Dismiss" is attached as Appendix D. This notice sets forth the reasons for the suspension and specifies:

> If you believe that this intended action is unjustified, you may, under regulations of the Civil Service Commission, within ten days from the service of this notice, notify me in writing of your reasons therefor and summarize the facts in support of your belief. A copy of your letter to me must be sent at the same time to the Personnel Director.

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The notice was signed by then Police Commissioner Sambor. Sullivan was also notified of his right to submit a letter within ten days to Police Commissioner Sambor. Neither the Police Commissioner nor the Personnel Director ever received a letter from any of the plaintiffs within the ten day period.

Each plaintiff police officer was dismissed "[e]ffective ten days from service of [the Notice of Intention to Dismiss]."

Each of the plaintiff police officers initiated individual grievances with the Police Commissioner for the purpose of challenging his dismissal. Pursuant to the FOP collective bargaining agreement with the City, the plaintiffs submitted their grievances to arbitration by an arbitrator designated by the American Arbitration Association. Plaintiffs' grievances were consolidated and were heard by one arbitrator. The arbitrator issued an opinion on November 25, 1985, in which he found that Christy, Pescatore and Garris had been dismissed for just cause. These three officers had not been indicted. The arbitrator determined that Gniotek and Sofronski were *not* dismissed for just cause because the City had not met its burden of proof. These two officers have not been indicted. The arbitrator ordered Gniotek and Sofronski reinstated if witnesses against them were not produced within two weeks of the date of his opinion. The grievances of Gioffre, Sullivan, Schwartz and Stansfield were "tabled pending final outcome, including possible appeals, of the proceedings in federal court." Arb. opin. at 2, Nov. 25, 1985. Gioffre, Sullivan and Schwartz were indicted and were found guilty. Stansfield has not been indicted.

Subsequent to their termination, the plaintiff police officers were advised by Anthony Witlin, the Executive Director of the Philadelphia Board of Pensions and Retirement (the "Board"),

that they may be disqualified from receiving pension benefits pursuant to § 217 of the Philadelphia Municipal Employees Retirement Ordinance. The Board is currently conducting hearings on the plaintiffs' rights to their pension benefits.

Defendants have listed the following eight grounds in support of their motion to dismiss or in the alternative for summary judgment:

1) Plaintiffs were lawfully dismissed for just cause under the Philadelphia Home Rule Charter;

2) Plaintiffs' discharge did not violate the Constitution because they were not dismissed for invoking their Fifth Amendment rights;

3) Plaintiffs' dismissals complied with the due process requirements for public employees;

4) Plaintiffs' complaint alleges no class-based discrimination for which relief can be granted under 42 U.S.C. §1985;

5) This Court should abstain from making any ruling on the propriety of plaintiffs' discharge under the Home Rule Charter;

6) Plaintiff Fraternal Order of Police lacks standing;

7) Plaintiffs' claims regarding their rights to a pension are premature; and

8) This Court should abstain from making any decision regarding plaintiffs' entitlement to a pension under section 217 of the Municipal Employees Retirement Ordinance.

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The plaintiffs, on the other hand, have moved for summary judgment and denial of the defendants' motion on the following four grounds:

1) Plaintiffs' discharges were not supported by just cause as a matter of law;

2) The failure/refusal of the City of Philadelphia to ask plaintiffs relevant questions relating to the proper performance of their duties and to discuss a proffer of immunity, but immediately terminating plaintiffs upon asserting their fifth amendment rights constituted discharge in violation of their assertion of that privilege;

3) The City's procedures and regulations governing procedural due process provide no predeprivation notice of charges or opportunity to be heard and, thus, are unconstitutional; and

4) The opinion of the City Solicitor, a determination that plaintiffs were not eligible for the receipt of a pension, constitutes a deprivation that must be preceded by notice and opportunity to be heard.

STANDING OF FRATERNAL ORDER OF POLICE

The defendants have moved for dismissal of the FOP on the ground that it lacks standing in this matter. The law is clear that representational standing can exist where the association alleges that its members have or will suffer immediate or threatened injury as a result of the challenged action; that the members could bring the same suit individually; and that the nature of the claim and the relief requested do not require the individual participation of the injured parties for a proper resolution. *Warth v. Seldin,*

422 U.S. 490, 511, 95 S.Ct. 2197, 2211-12 (1975). *See also Hunt v. Washington State Advertising Commission,* 432 U.S. 333, 97 S.Ct. 2434 (1977); *Philadelphia Lodge No. 5 v. City of Philadelphia,* 599 F.Supp. 254, 257 (E.D. Pa. 1984). There is no question that the FOP represents all uniformed employees of the Philadelphia Police Department. Plaintiffs' complaint challenges departmental practices which pertain to dismissal of uniformed employees, and seeks declaratory and injunctive relief. Since the allegations raised by the FOP fulfill each of the three requirements outlined by the Supreme Court, the FOP has standing in this case. Defendants' motion to dismiss the FOP on the ground that it lacks standing will be denied.

FAILURE TO STATE A CAUSE OF ACTION UNDER § 1985

The defendants seek dismissal of plaintiffs' claim brought pursuant to 42 U.S.C. § 1985. Because plaintiffs do not allege any facts or circumstances to support a claim under § 1985, defendants' motion to dismiss will be granted. In order to state a cause of action under 42 U.S.C. § 1985, plaintiffs must allege "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions." *Griffin v. Breckinridge,* 403 U.S. 88, 102, 91 S.Ct. 1790, 1798 (1971) (footnote omitted); *Carchman v. Korman Corp.,* 594 F.2d 354 (3d Cir.), *cert. denied* 444 U.S. 898 (1979). Plaintiffs' allegations do not meet this requirement. Therefore the plaintiffs' 42 U.S.C. § 1985 claim will be dismissed.

DEPRIVATION OF PENSIONS WITHOUT DUE PROCESS

The plaintiffs have submitted to the Philadelphia Board of Pensions and Retirement (the "Board") the issue of whether plaintiffs are barred from receiving their pensions. The Court has

not been advised as to whether the Board has made a determination. Plaintiffs have, however, asked this Court to determine that the plaintiff police officers have been deprived of their pensions without due process of law. The plaintiffs' claim of deprivation of property without due process of law is therefore not ripe for determination because apparently the Board is currently reviewing whether plaintiffs will be barred from receiving their pensions. As stated by Judge Giles in *Amanto v. Witlin,* 544 F.Supp. 140, 142 (E.D. Pa. 1981)

> There must at least be some definitive administrative determination resulting in a denial or deprivation of due process before [plaintiff] can raise such a [§1983] claim. Until there is a final decision which has a practical impact on a litigant, it is not ripe for adjudication. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 87 S.Ct. 1507 (1967); *United States ex rel. Ricketts v. Lightcap,* 567 F.2d 1226 (3d Cir. 1977) (dictum) (usual ripeness standard applies in section 1983 cases). The basic rationale underlying the ripeness standard as articulated by the Supreme Court is to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott,* 387 U.S. at 148-49, 87 S.Ct. at 1515.

544 F.Supp. at 142. Plaintiffs' claim for relief in connection with the alleged unconstitutional deprivation of their pensions will

therefore be dismissed on the ground that this claim is not ripe for adjudication.

SUMMARY JUDGMENT: DISMISSAL FOR ASSERTING FIFTH AMENDMENT

Plaintiffs claim that the plaintiff police officers were dismissed because they asserted their fifth amendment privilege against self-incrimination. In support of their contention, it is asserted that the Police Department was required to ask the plaintiff police officers questions concerning the performance of their duties and to offer them immunity by assuring them that their answers would not be used against them. Plaintiffs' assert that *Garner v. Broderick*, 392 U.S. 273, 88 S.Ct. 1913 (1968) requires such a procedure. The Court disagrees. *Gardner* holds only that the Constitution prohibits a policeman from being terminated solely on the basis of his refusal to waive his fifth amendment privilege against self-incrimination. The Supreme Court in *Gardner* stated:

> The question presented in the present case is whether a policeman who refuses to waive the protections which the [fifth amendment] privilege gives him may be dismissed from office because of that refusal.

392 U.S. at 276, 88 S.Ct. at 1915. The Supreme Court answered the above question by stating "the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment." *Id.* at 279, 88 S.Ct. at 1916.

While plaintiffs' attempt to characterize the dismissals as

reprisals for the plaintiff police officers asserting their fifth amendment privilege, there is nothing in this record indicating that the plaintiff police officers were dismissed because they asserted their fifth amendment privilege. Seven of the nine plaintiff police officers have stated in depositions that they do not believe that they were dismissed for asserting their fifth amendment privilege. See Depositions of Gniotek, Christy, Garris, Sofronski, Schwartz, Stansfield and Gioffre. Def. Ex. B. Police Commissioner Sambor stated in his deposition that the officers were dismissed because of the testimony regarding their misconduct made during the *Martin* and *Volkmar* criminal trials. Def. Ex. E. The material facts concerning which there are no genuine issues demonstrate that the plaintiff police officers were dismissed on the basis of their alleged involvement in bribery schemes. Defendants are, therefore, entitled to summary judgment in connection with this fifth amendment claim.

SUMMARY JUDGMENT: PROCEDURAL DUE PROCESS

The basic issue presented by the cross-motions for summary judgment is whether the procedural due process rights of the police officers were violated by the procedures employed by the defendants in effectuating the suspensions and dismissals of the plaintiff police officers. All parties rely on the due process procedural requirements recently enunciated by the United States Supreme Court in *Cleveland Board of Education v. Loudermill*, ____ U.S. ____, 105 S.Ct. 1487 (1985). The plaintiffs claim that they were not afforded the due process required by *Loudermill*, whereas the defendants claim that they were.

Loudermill involved two plaintiffs, James Loudermill and Richard Donnelly, who had been employed, respectively, by the Cleveland Board of Education and the Parma Board of Education.

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Each plaintiff had been terminated from employment without the chance to respond to the employer's charges against him. Each employee's case had been dismissed by the district court for failure to state a claim. The Supreme Court ruled that the district court erred because plaintiffs were not given the opportunity prior to their dismissals to explain their side of the story. The Court held that due process requires that a public employee with a property right in continued employment be given the opportunity to respond prior to his or her dismissal, in addition to administrative procedures providing for a post-termination hearing. 105 S.Ct. at 1496.

As the Supreme Court points out in *Loudermill*, a public employee's entitlement to an opportunity to respond to the charges made against him depends upon the existence of a constitutionally protected property interest in his employment. *Board of Regents v. Roth,* 408 U.S. 564, 576-78, 92 S.Ct. 2701, 2708-10 (1972). Property interests are created by state law. *Bishop v. Wood,* 426 U.S. 341, 96 S.Ct. 2074 (1976). In this case, the Court is required to look to the law of Pennsylvania to determine whether the plaintiff police officers had a constitutionally protected property interest in their employment. The Court and parties agree that under the law of Pennsylvania the plaintiff police officers do have a sufficient property interest in their employment to require the application of the due process procedures set forth in *Loudermill.*

The issue which this Court must decide is whether the procedures afforded the plaintiff police officers by the defendants under the circumstances hereinbefore discussed pass muster under *Loudermill.* As pointed out by the Supreme Court "the root requirement" of due process is that a person be given notice and opportunity to be heard prior to deprivation of a significant property interest. *Loudermill, supra* at 1493 citing inter alia

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Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656 (1950) and *Boddie v. Connecticut*, 401 U.S. 371, 374, 91 S.Ct. 780, 786 (1971). The Court stated in *Loudermill*

> The need for some form of pretermination hearing, . . . is evident from a balancing of the competing interests at stake. These are the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination. *See Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed. 2d 18 (1976).

105 S.Ct. at 1494. The Supreme Court delineated the constitutionally required pretermination due process procedures as follows: "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." 105 S.Ct. at 1495 (citations omitted). The Supreme Court reasoned:

> Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions - essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.

105 S.Ct. at 1495 (citation omitted). The Court in *Loudermill* also recognizes that in addition to the pretermination requirements,

a public employee who may be discharged only for cause has a constitutional right to a post-termination hearing. As stated by the Court: "We conclude that all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures . . ." 105 S.Ct. at 1496.

This Court has determined that the material facts concerning which there are no genuine issues support defendants' position that the pretermination due process requirements articulated in *Loudermill* have been satisfied by the procedures employed by the defendants in this case.

1. Notice and Explanation of the Charges

As heretofore pointed out, on the day after the implicating testimony was given in the federal court, each of the plaintiff police officers, except Sullivan, was ordered to report to the Ethics Accountability Division. Each officer appeared with his counsel, was individually interviewed and was advised that he had been identified in federal court testimony as the recipient of bribes in connection with the performance of his duties as a police officer. Each officer was also advised that he was the subject of a Philadelphia Police Department criminal investigation. Each officer after suspension, received a copy of a "Statement of Charges Filed and Action Taken" ("Statement"). *See* Appendix C. The Statement lists the violations of the Police Disciplinary Code with which each individual police officer was charged. In addition, each police officer received after suspension, a "Notice of Intention to Dismiss", *see* Appendix D, which stated therein the reason for the intention to dismiss.

2. Opportunity to Respond

Prior to dismissal, the plaintiff police officers had an

opportunity to respond to the allegations made against him. At the Ethics Accountability interview, each officer was given his *Miranda* warnings with his counsel present and was asked if he wished to give a statement. *See* Appendix A. Each officer, on advice of his counsel, asserted his fifth amendment privilege and chose to remain silent. Additionally, the "Notice of Intention to Dismiss", *see* Appendix D, a copy of which each plaintiff police officer received, specified:

> If you believe that this intended action is unjustified, you may, under regulations of the Civil Service Commission, within ten days from the service of this notice, notify me in writing of your reasons therefor and summarize the facts in support of your belief. A copy of your letter to me must be sent at the same time to the Personnel Director.

The record, therefore, reveals that each plaintiff police officer received oral and written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story prior to dismissal from the Police Department.

3. Post-Termination Hearing

Plaintiff police officers are afforded post-termination remedies which clearly exceed the minimum requirements approved by the Supreme Court in *Loudermill.* 105 S.Ct. at 1496. They are given the option to appeal to the Civil Service Commission or to pursue their grievances through arbitration as provided in the police officers' collective bargaining agreement with the City.

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The Civil Service Regulations specify that within 30 days of dismissal, the plaintiffs have the right to appeal. Phila.Civ.Serv.Regs. § 17.06. The Regulations allow for a full hearing at which time both sides have the right to be heard and to present evidence. The Commission has the power to reinstate a former employee and to award backpay. 351 Pa.Admin.Code § 7.7-201 (Shepard's 1983). Furthermore, as was the case in *Loudermill*, once plaintiffs have appealed pursuant to the Civil Service Regulations, the result is reviewable in the state court. Pennsylvania law provides for appeal of the Civil Service Commission decision to the Court of Common Pleas. 53 Pa.Cons.Stat.Ann § 752 (Purdon 1981).

As heretofore pointed out, plaintiffs have pursued their grievances through arbitration, which is the option provided to the police officers under their collective bargaining agreement with the City. The collective bargaining agreement provides for a full post-termination evidentiary hearing before an arbitrator. *See* 43 Pa.Cons.Stat.Ann. § 217.1 (Purdon Supp. 1985). The arbitrators' decision is appealable to the Court of Common Pleas. 42 Pa.Cons.Stat. Ann. § 933(b) (Purdon 1981).

SUMMARY JUDGMENT: JUST CAUSE

Finally, there are cross-motions for summary judgment in connection with the plaintiffs' claim that the plaintiff police officers were dismissed without "just cause." Plaintiffs contend that the defendants based their decisions to terminate the officers on uncorroborated hearsay. The contention that the dismissals were without "just cause" does not rise to the level of a constitutional claim. Section 1983 actions are not vehicles for reviewing the evidentiary basis employed by a state or municipality in terminating the employment of a state or municipal employee.

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Section 1983 causes of action are limited to those situations where some constitutional right of the plaintiff has been violated.

As heretofore pointed out, the issue as to whether there was "just cause" for dismissing the plaintiff police officers may be appealed to the Civil Service Commission or, at the option of the police officers, submitted to arbitration. The plaintiff police officers have already submitted the issue of "just cause" to arbitration pursuant to the collective bargaining agreement between the police officers and the City of Philadelphia, and the police officers have the right to appeal the decision of the arbitrator to the Court of Common Pleas and thereafter through the state appellate process. The options which are provided to the police officers for determining whether they were dismissed without "just cause" clearly do not provide a basis for a constitutional violation. In this case, as in *Cohen v. City of Philadelphia*, 736 F.2d 81 (3d Cir.), *cert. denied*, 105 S.Ct. 434 (1984), the State of Pennsylvania and the City of Philadelphia have provided the police officers with ample procedures to determine whether the police officers were dismissed without "just cause." As stated by the court in *Cohen*:

> We thus join the First and Seventh Circuits in holding that substantive mistakes by administrative bodies . . . do not create a federal claim so long as correction is available by the state's judiciary . . . . In this case, because Pennsylvania has provided a means of correcting the errors that will sometimes occur at the administrative level, no deprivation without due process of law has occurred.

736 F.2d at 86 (citations and footnote omitted). The Court

concludes, for all of the above reasons, that the defendants are also entitled to summary judgment on the plaintiffs' claim that the police officers were dismissed without "just cause."

In addition, as contended by the defendants, the "just cause" issue may well be an issue from which this Court should abstain pursuant to the doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971) and its progeny. The Court is well aware, as pointed out by our Third Circuit in *Johnson v. Kelly*, 583 F.2d 1242 (3d Cir. 1978), " 'The doctrine of abstention, . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.' " *Johnson*, 583 F 2d at 1249-50 quoting *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244 (1976). Applying the analysis of *Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911 (1977) made by the Third Circuit in *Johnson v. Kelly*, one can readily conclude that a) state action was pending against the plaintiffs in this case when they filed their complaint; b) the state action was in effect an action taken by a subdivision of the state, the City of Philadelphia; c) the state action in dismissing the plaintiff police officers was intended to vindicate an important policy of the city for the protection of its residents; and d) the city had the option of vindicating that policy through criminal prosecutions. *Johnson*, 583 F.2d at 1248. The concept of federalism does not appear to tolerate a United States District Court making the evidentiary determination as to whether police officers, whether employed by the state or municipality, have committed acts which require their dismissal.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 84-5242

LOUIS GNIOTEK, CARMEN CHRISTY, JOSEPH GIOFFRE, AUGUSTINE PESCATORE, LEONARD GARRIS, EUGENE SULLIVAN, DAVID SOFRONSKI, ROBERT SCHWARTZ, ROBERT STANSFIELD, and FRATERNAL ORDER OF POLICE

Plaintiffs

vs.

CITY OF PHILADELPHIA, W. WILSON GOODE, LEO BROOKS, GREGORE J. SAMBOR, ANDREAS HANTWERKER, JOHN STRAUB, ESQ., and BARBARA MATHER, Solicitor

Defendants

O R D E R

AND NOW, this 7th day of March, 1986, upon consideration of defendants' motion to dismiss or in the alternative for summary judgment and upon consideration of plaintiffs' cross-motion for summary judgment, for the reasons set forth in this Court's Memorandum of March 7, 1986

IT IS ORDERED:

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a) The defendants' moton to dismiss the Fraternal Order of Police from the action is DENIED;

b) The defendants' motion to dismiss plaintiffs' claim pursuant to 42 U.S.C. § 1985 is GRANTED;

c) The defendants' motion to dismiss plaintiffs' claim in connection with the deprivation of their pension is GRANTED;

d) The defendants' motion for summary judgment in connection with plaintiffs' procedural due process claim is GRANTED and judgment is entered in favor of defendants and against plaintiffs;

e) The defendants' motion for summary judgment in connection with plaintiffs' fifth amendment claim is GRANTED and judgment is entered in favor of defendants and against plaintiffs; and

f) The defendants' motion for summary judgment in connection with plaintiffs' claim that they were not dismissed for "just cause" is GRANTED and judgment is entered in favor of defendants and against plaintiffs.

s/ Raymond J. Broderick
RAYMOND J. BRODERICK, J.

Appendix B

STATEMENT OF: P/O Louis Gniotek #1488, 5th District

DATE AND TIME: July 20, 1984; 1200 hours

PLACE: Staff Inspectors' Headquarters, 323 Race Street

CONCERNING: ACCEPTANCE OF BRIBES WHILE ASSIGNED TO THE 5TH POLICE DISTRICT

IN PRESENCE OF: Inspector Andreas Hantwerker
Deputy City Solicitor John Straub
Captain Joseph Stine #101,
C.O. 5th District
FOP Attorney Anthony Molloy

INTERROGATED BY: Inspector Andreas Hantwerker

RECORDED BY: Kathleen Rodriguez, Clerk Steno III, directly on the typewriter.

I am Inspector Andreas Hantwerker, this is Deputy City Solicitor John Straub and your C.O., Captain Joseph Stine.

We are questioning you concerning testimony presented in Federal Court under oath by Eugene Boris an admitted number writer, that he paid to you $60 per month for an extended period beginning in 1982 for protection of his illegal activities.

We have a duty to explain to you and to warn you that you have the following legal rights:

A. You have a right to remain silent and do not have to say anything at all.

B. Anything you say can and will be used against you in Court.

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C. You have a right to talk to a lawyer of your own choice before we ask you any qustions, and also to have a lawyer here with you while we ask questions.

D. If you cannot afford to hire a lawyer, and you want one, we will see that you have a lawyer provided to you, free of charge, before we ask you any questions.

E. If you are willing to give us a statement, you have a right to stop any time you wish.

1. Q. Do you understand that you have a right to keep quiet, and do not have to say anything at all? A. Yes.

2. Q. Do you understand that anything you say can and will be used against you? A. Yes.

3. Q. Do you want to remain silent? A. Yes, on the advice of counsel.

4. Q. Do you understand that you have a right to talk with a lawyer before we ask you any questions? A. ____

5. Q. Do you understand that if you cannot afford to hire a lawyer, and you want one, we will not ask you any questions until a lawyer is appointed for you free of charge. A. ____

6. Q. Do you want to talk with a lawyer at this time, or to have a lawyer with you while we ask you questions? A. ____

7. Q. Are you willing to answer questions of your own free will, without force or fear, and without any threats or promises having been made to you? A. ____

Statement of: s/ Illegible Date: Illegible

Appendix B

MEMORANDUM CITY OF PHILADELPHIA
Date 7/20/84

TO: P/O Louis Gniotek #1488, 5th District

FROM: Inspector Andreas Hantwerker

SUBJECT: NOTICE OF SUSPENSION WITH INTENT TO DISMISS

You are hereby notified, by order of the Police Commissioner, that effective immediately you are suspended for a period of thirty (30) days with Intent to Dismiss.

s/ A. Hantwerker
NAME

7/20/84
DATE

s/ Capt. Joseph Stine #101
WITNESS (COMMAND OFFICER)

7-20-84
DATE

s/ Illegible
SIGNATURE (POLICE OFFICER)

Appendix B

CITY OF PHILADELPHIA
POLICE DEPARTMENT

STATEMENT OF CHARGES FILED AND ACTION TAKEN

Misconduct Report No. 84-146
Date 7-20-84

TO: POLICE COMMISSIONER

FILED AGAINST Police Officer Louis Gniotek

PLATOON & GROUP ASSIGNMENT 3 A

DISTRICT OR UNIT 5th District

DATE OF APPOINTMENT 10-72

PAYROLL NUMBER 137109

DATES OF VACATION, MIL. LEAVE, ETC. Suspended

CHARGES

ARTICLE I CONDUCT UNBECOMING AN OFFICER

Section 1.01 Accepting bribes or gratitudes for permitting illegal acts.

Specification #1 "In that while assigned to the 5th Police District, you did accept from Eugene Boris, an admitted number writer, monetary payments on a monthly basis for an extended period beginning in 1982 for protection of his illegal activities."

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Section 1.05	Failure to report, in writing, offers of bribes or gratituties to permit illegal acts.
Specification #1	"In that while assigned to the 5th Police District, you did accept from Eugene Boris, an admitted number writer, monetary payments on a monthly basis for an extended period beginning in 1982 for protection of his illegal activities."
Section 1.20	Knowingly conversing or associating with known gamblers while on or off duty.
Specification #1	"In that while assigned to the 5th Police District, you did accept from Eugene Boris, an admitted number writer, monetary payments on a monthly basis for an extended period beginning in 1982 for protection of his illegal activities."

PREFERRED BY (Signature)
Captain Joseph J. Stine #101

APPROVED DISTRICT COMMANDER (Signature)
Captain Joseph J. Stine #101

APPROVED DIVISION COMMANDER (Signature)
s/ Illegible 7/23/84

RECEIVED BY (Signature of Accused) (Date)
s/ Louis Gniotek 7-20-84

☒ I Plead Not Guilty & Request a Hearing
(Sig. & Date) s/ Louis Gniotek 7-20-84

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ACTION RECOMMENDED

☒ BOARD OF INQUIRY ☐ REPRIMAND ☐ Other: Suspension

s/ Illegible
(Chief Inspector)

s/ Illegible 7-27-84
(Deputy Commissioner)

ACTION TAKEN

☐ BOARD OF INQUIRY ☐ REPRIMAND ☐ DISMISS CHARGES

☐ OTHER Dismissal

s/ Illegible
(Commissioner)

Appendix B

CITY OF PHILADELPHIA
POLICE DEPARTMENT

STATEMENT OF CHARGES FILED AND ACTION TAKEN

Misconduct Report No. 84-146
Date 7-20-84

TO: POLICE COMMISSIONER

FILED AGAINST Police Officer Louis Gniotek

PLATOON & GROUP ASSIGNMENT 3 A

DISTRICT OR UNIT 5th District

DATE OF APPOINTMENT 10-72

PAYROLL NUMBER 137109

DATES OF VACATION, MIL. LEAVE, ETC. Suspended

CHARGES

ARTICLE I CONDUCT UNBECOMING AN OFFICER

Section 1.25 Knowingly associates, fraternizes, or conducts business transaction at any time, or in any manner whatsoever, with known criminals or persons engaged in unlawful activities.

Specification #1 "In that while assigned to the 5th Police District, you did accept from Eugene Boris, an admitted number writer, monetary payments on a

monthly basis for an extended period beginning in 1982 for protection of his illegal activities."

Section 1.75 Repeated violations of departmental rules and regulations, and/or any other course of conduct indicating that a member has little or no regard for his responsibility as a member of the Police Department.

Specification #1 "In that while assigned to the 5th Police District, you did accept from Eugene Boris, an admitted number writer, monetary payments on a monthly basis for an extended period beginning in 1982 for protection of his illegal activities."

Section 1.20 Knowingly conversing or associating with known gamblers while on or off duty.

Specification #1 "In that while assigned to the 5th Police District, you did accept from Eugene Boris, an admitted number writer, monetary payments on a monthly basis for an extended period beginning in 1982 for protection of his illegal activities."

PREFERRED BY (Signature)
Captain Joseph J. Stine #101

APPROVED DISTRICT COMMANDER (Signature)
Captain Joseph J. Stine #101

APPROVED DIVISION COMMANDER (Signature)
s/ Illegible 7/23/84

Appendix B

RECEIVED BY (Signature of Accused) (Date)
s/ Louis Gniotek 7-20-84

☒ I Plead Not Guilty & Request a Hearing
(Sig. & Date) s/ Louis Gniotek 7-20-84

ACTION RECOMMENDED

☒ BOARD OF INQUIRY ☐ REPRIMAND ☐ Other: Suspension

s/ Illegible s/ Illegible 7-27-84
(Chief Inspector) (Deputy Commissioner)

ACTION TAKEN

☐ BOARD OF INQUIRY ☐ REPRIMAND ☐ DISMISS CHARGES

☐ OTHER Dismissal s/ Illegible
(Commissioner)

Appendix B

CITY OF PHILADELPHIA
POLICE DEPARTMENT

STATEMENT OF CHARGES FILED AND ACTION TAKEN

Misconduct Report No. 84-146
Date 7-20-84

TO: POLICE COMMISSIONER

FILED AGAINST Police Officer Louis Gniotek

PLATOON & GROUP ASSIGNMENT 3 A

DISTRICT OR UNIT 5th District

DATE OF APPOINTMENT 10-72

PAYROLL NUMBER 137109

DATES OF VACATION, MIL. LEAVE, ETC. Suspended

CHARGES
ARTICLE IV NEGLECT OF DUTY

Section 4.01 Failure to take police action, on or off duty, in or out of uniform, and/or failure to make the required written report.

Specification #1 "In that while assigned to the 5th Police District, you did accept from Eugene Boris, an admitted number writer, monetary payments on a monthly basis for an extended period beginning

Appendix B

in 1982 for protection of his illegal activities."

Section 4.20 Failure to comply with any Commissioner's Orders, Directives, Regulations, etc. or any oral or written orders of superiors.

Specification #1 "In that while assigned to the 5th Police District, you did accept from Eugene Boris, an admitted number writer, monetary payments on a monthly basis for an extended period beginning in 1982 for protection of his illegal activities."

PREFERRED BY (Signature)
Captain Joseph J. Stine #101

APPROVED DISTRICT COMMANDER (Signature)
Captain Joseph J. Stine #101

APPROVED DIVISION COMMANDER (Signature)
s/ Illegible 7/23/84

RECEIVED BY (Signature of Accused) (Date)
s/ Louis Gniotek 7-20-84

☒ I Plead Not Guilty & Request a Hearing
(Sig. & Date) s/ Louis Gniotek 7-20-84

ACTION RECOMMENDED

☒ BOARD OF INQUIRY ☐ REPRIMAND ☐ Other: Suspension

s/ Illegible s/ Illegible 7-27-84
(Chief Inspector) (Deputy Commissioner)

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ACTION TAKEN

☐ BOARD OF INQUIRY ☐ REPRIMAND ☐ DISMISS CHARGES

☑ OTHER Dismissal

s/ Illegible
(Commissioner)

Appendix B

CITY OF PHILADELPHIA
POLICE DEPARTMENT

STATEMENT OF CHARGES FILED AND ACTION TAKEN

Misconduct Report No. 84-146
Date 7-20-84

TO: POLICE COMMISSIONER

FILED AGAINST Police Officer Louis Gniotek

PLATOON & GROUP ASSIGNMENT 3 A

DISTRICT OR UNIT 5th District

DATE OF APPOINTMENT 10-72

PAYROLL NUMBER 137109

DATES OF VACATION, MIL. LEAVE, ETC: Suspended

CHARGES

ARTICLE V	DISOBEDIENCE OF ORDERS
Section 5.01	Soliciting money or any valuable thing without proper authorization.
Specification #1	"In that while assigned to the 5th Police District, you did accept from Eugene Boris, an admitted number writer, monetary payments on a monthly basis for an extended period beginning in 1982 for protection of his illegal activities."

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PREFERRED BY (Signature)
Captain Joseph J. Stine #101

APPROVED DISTRICT COMMANDER (Signature)
Captain Joseph J. Stine #101

APPROVED DIVISION COMMANDER (Signature)
s/ Illegible 7/23/84

RECEIVED BY (Signature of Accused) (Date)
s/ Louis Gniotek 7-20-84

☒ I Plead Not Guilty & Request a Hearing
(Sig. & Date) s/ Louis Gniotek 7-20-84

ACTION RECOMMENDED

☒BOARD OF INQUIRY☐ REPRIMAND☐ Other: Suspension

s/ Illegible (Chief Inspector)

s/ Illegible 7-27-84 (Deputy Commissioner)

ACTION TAKEN

☐ BOARD OF INQUIRY ☐ REPRIMAND ☐ DISMISS CHARGES

☐ OTHER Dismissal

s/ Gregore Sambor (Commissioner)

Appendix B

CITY OF PHILADELPHIA

NOTICE OF INTENTION TO DISMISS

Louis W. Gniotak
3308 Fordham Road
Phila., PA 19114

s/ Louis W. Gniotak

NOTICE SERVED

UPON (Employee specified) P/O Louis W. Gniotak § 1488 PR #137109

☒ BY MAIL ☒ PERSONALLY

DATE SERVED 7-24-84

DEPARTMENT, DIVISION, ETC. Police - 5th District

TITLE OF POSITION Police Officer

Effective ten days from service of this notice, it is our intention to dismiss you from your position with the City of Philadelphia as referred to above. My reasons for intending to take such actions are:

"While assigned to the 5th Police District you did accept $60.00 per month from Eugene Boris, an admitted numbers writer, for an extended period of time beginning in 1982 in return for your not enforcing vice laws against Mr. Boris' illegal number writing activities."

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As a result of the above-mentioned conduct, you are charged with the following violations of the Police Department policies:

1.01 Accepting Bribes
1.05 Failure to Report Bribes
1.20 Knowingly Conversing or Associating with Known Criminals
1.25 Knowingly Fraternizing With Criminals
1.75 Conduct Unbecoming an Officer - Showing Little or No Regard For Responsibilities
4.01 Failure to Take Police Action
4.20 Failure to Comply With Orders, Directives and Regulations
5.01 Soliciting Money

The above course of conduct indicates you have little or no regard for your responsibilities as a Police Officer with the Philadelphia Police Department.

> "You are hereby officially notified that for the same reasons you are suspended without pay from your position effective at the beginning of your tour of duty on JULY 20, 1984, for thirty days, or until your prior dismissal."

If you believe that this intended action is unjustified, you may, under regulations of the Civil Service Commission, within ten days from the service of this notice, notify me in writing of your reasons therefor and summarize the facts in support of your belief. A copy of your letter to me must be sent at the same time to the Personnel Director.

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Your replying to this notice and sending a copy of your reply to the Personnel Director does not constitute an appeal to the Civil Service Commission. You may appeal to the Civil Service Commission only when this intended action becomes final and within thirty days thereafter.

s/ Gregore J. Sambor
POLICE COMMISSIONER

APPENDIX C—OPINION AND AWARD OF ARBITRATOR

AMERICAN ARBITRATION ASSOCIATION

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

CITY OF PHILADELPHIA

-and-

FRATERNAL ORDER OF POLICE

CASE NUMBER: 14 390 1904 84 J

AWARD OF ARBITRATOR

The UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated July 1, 1984 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

1. The terminations of grievants Christy, Pescatore and Garris are found to have been with just cause, and the grievances protesting those terminations must therefore be denied.

2. In the terminations of grievants Gniotek and Sofronski, the City will be granted a period of two weeks from the date of the present award to bring in, as part of a reopening of this arbitration hearing, either or both of the two witnesses on whose testimony in federal court the present

discharges of Gniotek and Sofronski were based. Failing the latter, grievants Gniotek and/or Sofronski shall be reinstated.

The question of monetary and related remedy aspects for Gniotek and Sofronski (in the event of their reinstatement pursuant to the preceding paragraph) shall be referred back to the parties for a four-week period to permit mutual discussion of a possible satisfactory final settlement of those aspects as well as of other outstanding aspects of these cases. Following the expiration of the aforementioned four-week period, either party may refer to remedy aspects back to the aribtrator for final resolution by him on the existing record.

As part of the aforementioned settlement effort or efforts, the parties will have the right to request mutual extension of the latter four-week period and also of the aforementioned two-week period being afforded the City to bring in the witnesses described.

In the event criminal proceedings should be instituted against either Gniotek or Sofronski prior to the full implementation of the present award, the City may request a stay of the award for such grievant.

3. The cases of grievants Gioffre, Sullivan, Schwartz and Stansfield shall be tabled pending final outcome, including possible appeals, of the federal court proceedings in which they have been

named. Either side will have the right to request a reopening and a final ruling by the present arbitrator for some or all of these five individuals at a later date, should such be required.

November 25, 1985

s/ Eli Rock
Eli Rock, Arbitrator

State of
County of

On this day of , 19 , before me personally came and appeared
to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

Appendix C

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between

CITY OF PHILADELPHIA

-and-

FRATERNAL ORDER OF POLICE

Case Number: 14 390 1904 84 J

OPINION

Issue

Dispute....with respect to discharge of Police Officers Gniotek, Christy, Pescatore, Garris, Gioffre, Sullivan, Sofronski, Schwartz and Stansfield.

Background

The above nine members of the City's police officer staff were discharged at various times in 1984 following notices to them of 30-day suspensions with intention to discharge. Each of the nine has grieved his discharge, and the nine cases were joined into a single arbitration case submitted to the present arbitrator under the collective bargaining agreement between the City and the Fraternal Order of Police, which is the collective bargaining agent for the Police Department.

All nine of the grievances had been named by witnesses in

a criminal proceeding in federal court involving other members of the department (the so-called "Martin trials"). The defendants in the latter trials had been basically charged with participating in and benefitting from a wide-scale program of bribery and corruption, involving pay-offs to the defendants by various gambling, prostitution and liquor law violators, in return for which the defendants did not enforce the law against those violators. For the most part, these other police department figures were convicted of the charges as a result of the federal trial in 1984.

During the course of the trials of the above defendants, witnesses who testified against them also named the instant nine grievants as recipients of bribes for the same aforementioned purposes. The nine grievants had not been designated as defendants in the Martin proceedings and were not party to those trials. Based on the testimony of the witnesses in those proceedings stating that bribes had also been given to the instant nine grievants in return for non-enforcement of the law, the Commissioner of Police terminated the grievants.

During the course of the arbitration hearings in this case, one of the grievants, Gioffre, has been brought to trial in federal court and has been convicted, with that conviction now pending on appeal. In addition two other grievants, Sullivan and Schwartz, have been indicted and are currently being tried in federal court. Still another grievant, Stansfield, has been named as an unindicted co-conspirator.

For the purpose of the present arbitration decision, the cases of Gioffre, Sullivan, Schwartz and Stansfield are being tabled, pending final outcome, including possible appeals, of the proceedings in federal court. Either side will have the right to request a re-opening and a final decision in the present arbitration

case for some or all of these four individuals, depending on the final judicial determinations in those cases.

The present arbitration decision will deal at this time only with the remaining five cases - namely those of Christy, Pescatore, Garris, Gniotek and Sofronski. Because of certain differences in the facts, as will become clear below, the first three of these five individuals will be dealt with separately from the other two.

The grievances of Christy, Pescatore and Garris

On behalf of these three individuals, the FOP has contended that the evidence on the merits fails to satisfy the burden of proof required to support their discharges. In addition, and at considerable length, it contends that the discharges must be set aside because the Police Department failed, in an unprecedented fashion, to follow its normal, required internal investigative procedures before terminating the grievants and because the Department has also treated the cases of these grievants in a discriminatory and unequal fashion by contrast to its treatment of other discipline cases. (The FOP has also advanced these same arguments in connection with the remaining six cases in this proceeding.)

The City has in turn contended that neither the collective bargaining agreement nor any applicable laws or regulations mandate any particular type of investigation in all discipline cases and that in any event, the unprecedented and unique circumstances applicable to the present cases fully warranted the procedure used in these cases.

In greater detail, the FOP has contended in the above connection that under the applicable rules and regulations, the

present grievants can only be disciplined after a showing of "just cause" and that long recognized as inherent in the latter concept is that the established fair and proper objective investigative procedures be used before the discipline is imposed and that discipline also be applied in an equal and non-discriminatory manner to all members of the bargaining unit; that the total lack of a prior investigation in the present cases, before discipline was imposed, is unprecedented in the department both before and since the Martin trials; that the entire evidence on which these disciplines were based consisted of observations by members of the department who were present during the Martin trials and heard the testimony of witnesses supposedly implicating the grievants, and that not a single one of those trial witnesses was later interviewed or questioned nor was any other investigation conducted by the department's regular designated investigating personnel who are normally used prior to imposition of discipline on all other members of the department; that in essence, therefore, the City has relied solely on what is at best uncorroborated hearsay accusations in a proceeding in which neither the City nor the grievants were party and has done nothing else to secure evidence to confirm or deny the validity of the accusations against the grievants; that in addition to its above totally unprecedented departure from the department's regular procedures preceding imposition of discipline, the City has treated the present grievants entirely differently from certain other police officers who were also named by witnesses, in the same fashion as the present grievants, in the post-Martin trial known as the "Deabler/Herron" case where identical types of charges were involved; that clearly the fact that these other named police officers have not been disciplined makes a mockery of the discharge of the present grievants, and on that basis alone, the latter must now be reinstated; that the same result is also mandated by the unequal treatment doled out by the City in the contemporaneous "Granny

case" where police officers who had been criminally indicted by a federal jury on other types of chargs were in no way disciplined by the department; that in addition, in the latter case there was the type of prior investigation by the department which has always been used in all other discipline cases, but was conspicuously lacking in the present one; and that support for the FOP's present position is found in a recent decision here by Arbitrator Lewis M. Gill where it was stated that the Police Commissioner was obligated to follow the department's established internal procedures.

In addition to its above arguments regarding procedural deficiency and inequality of treatment, the FOP has also argued, as earlier noted, that the uncorroborated, self-serving testimony of the witnesses introduced by the City in the present arbitration falls far short of the heavy burden of proof required to establish just cause in so serious a set of charges as those used to support the present discharges. The FOP also stresses that the here-discussed three grievants, unlike the defendants in the Granny case, have never been indicted.

I am mindful of the extreme seriousness of the present charges, and I have weighed carefully the various, aforementioned contentions advanced by the FOP on behalf of the present grievants. My judgment in the matter must, however, uphold the City's action in these three cases.

It is important to note, on the procedural arguments of the FOP, that these are all addressed to the proceedings prior to the present arbitration. There is no contention, nor any possible basis for one, that in the arbitration proceeding as such, there have been procedural deficiencies. There has been a full opportunity in this arbitration to hear all aspects of the merits, and at least

insofar as the here-discussed three grievants are concerned, direct testimony by witnesses on behalf of the City was subject to cross-examination by counsel for the grievants.

On the procedural aspect as such it is true, as the City has here contended, that there does not exist, in the collective bargaining agreement, a mandatory requirement that the department conduct any particular type of internal investigative procedure before disciplining a member of the force. It should be noted that in this case, the grievants were, prior to termination, afforded an opportunity by the department to make a statement rebutting in any detail they wished the charges being made against them. Also, they presumably could have come forward subsequently, during the 30-day period between the notice-of-suspension-with-intent-to-dismiss and final discharge, with an offer of evidence to counter the charges. Neither of these opportunities was taken up by the grievants. As indicated, however, the FOP contends that a fuller investigation, by the department itself, should have been made before the imposition of the discipline — in accord with the Department's universal normal practice.

It is not necessary here to rule on the proper or required prior investigative procedure for *all* cases, and I do not so rule on that broad question at this time. Clearly there appears to have been a departmental practice of conducting investigations in other cases that was different from the course followed in the present case. At the same time, the facts in the present case appear to have been completely unique.

According to the present record, there has been no *cited* prior departmental discipline case like this one, in which reliable-appearing witnesses have under oath in a court proceeding specifically spelled out corrupt transactions involving themselves

and members of the police department. Insofar as the present three grievants are concerned, those witnesses were themselves former members of the department who were personally acquainted with the grievants. False testimony by these witnesses would have subjected them to charges of perjury.

Under these latter particular circumstances, and recognizing that the rights of the grievants would still be fully protected at the *arbitration* level, a further prior investigation by the department before imposing discipline would have in my judgment represented a meaningless action; and in *these* circumstances, if in none other, such a requirement could only have been imposed if the collective bargaining agreement as such required it.

I can similarly find no basis for reversing the City based on the FOP's arguments regarding the "Deabler/Herron" and the "Granny cases."

In the former, a separate trial took place in federal court involving similar corruption-bribery charges against various police officers, and during that trial also, witnesses testified as to bribery-corruption involvement of other police officers who had not been indicted and were not party to the trial. In that case the latter named officers were transferred to the radio room by the department rather than being terminated.

The City has stated that its reason for treating these particular policemen differently than the present grievants was that the witnesses who had named the unindicted officers during testimony in the Deabler/Herron trial did not appear to the department's observers to have testified with sufficient clarity and reliability to have warranted discharge action at that particular time, pending an opportunity to question those witnesses further. It stated also

that further action was being reserved in those cases until the witnesses in question would be made available to the department by the U.S. Attorney's office. By contrast, states the City, the witnesses who had testified against the instant grievants were totally reliable, and hence justified the more immediate action.

The FOP has contended that the latter is a distinction without meaning and that the disparate treatment of the instant grievants in contrast to that afforded to the officers in Deabler/Herron is a clear case of unfair and unequal treatment.

It is clear that this particular aspect of the present case relates to the Commissioner's or the department's judgment in evaluating the treatment to be meted out to two separate groups of officers. The claim of disparate or unequal treatment is by no means an unusual one in the arbitration of discipline cases under a collective bargaining agreement. Such a claim can be and has been recognized where there is a reasonably close identity of facts in the separate cases being compared. More frequently, however, it is difficult to establish such identity; and given the existence of factual differences, management discretion to treat separate factual situations separately is regularly recognized — particularly if there is no showing of any discriminatory purpose or intent on management's part in its approach to the two sets of cases.

There can be no question that *objective* differences did exist between the instant two groups of officers. In the present case, as has already been noted, the testimony against the here-discussed three grievants was extremely strong, and came from two fellow police officers who knew the grievants, who had worked with them, and who could not credibly be mistaken (as will be found below) in their identification of the grievants. By contrast, there were no such fellow-officer witnesses among those who named

the individuals in the Deabler/Herron trial; and there were some clear indications, during the testimony of the identifying witnesses in that trial, of possible inadequate or mistaken identity plus other weaknesses.

It may well be that the individuals involved in Deabler/Herron will also eventually be disciplined, and that such a discipline could be upheld in arbitration. Nevertheless, given the above factual differences between the two sets of cases, it cannot be doubted that there was objective justification for the department's separate exercise of its management discretion between the two cases.

Also, given the above differences, there was objective justification for the department's decision to conduct a further prior investigation in the case of the Deabler/Herron officers, by contrast with its decision not to conduct such a further investigation in the present case, as discussed earlier above. By the same token, I can find no support in either the department's treatment of the "Granny squad" case or in the cited decision by Arbitrator Lewis M. Gill to warrant an upholding of the FOP's procedural or due process contentions in the present case, given my above holding and comments in connection with Deabler/Herron, and given the obvious factual differences between the present case and the case before Mr. Gill.

Turning now to the merits of the terminations of grievants Christy, Pescatore and Garris, and the question of whether there was factual just cause for their terminations, it is in my judgment clear beyond question that the City has met its burden of proof on that score.

As earlier stated, two fellow officers of these three grievants testified in the *present arbitration* against them. One of those fellow

officers, Alvaro, was the Lieutenant in charge of the Vice Squad in the Northwest Police Division; and the three grievants were members of that squad, supervised by Alvaro. The second officer who testified against the grievants, Ricci, was a member of that same squad and was the so-called "bag man" who collected the pay-off money from the gambling and other figures who were thus buying protection.

Both Alvaro and Ricci testified in the present arbitration, where they were subject to cross-examination, that they had shared the money collected by Ricci with the three grievants. Ricci testified to handing the money to the grievants directly. Alvaro testified that he, Alvaro, as well as the grievants had been selected for the Vice Squad by Inspector Joseph De Perri, who was in charge of the Northwest Division at the time and who shared in the later distribution of the bribery money. De Perri has been earlier convicted in the "Martin trials," as a principal figure in what appears to have been a broad-based scheme of corruption. De Perri's criminal conviction, as well as that of others, was based on testimony by Alvaro and Ricci, among others.

Further detail on this aspect of the case would appear to be superfluous. The FOP's attacks on the credibility of the above two witnesses cannot in my judgment be upheld. The countering testimony and arguments offered on behalf of the grievants is clearly insufficient to offset the testimony of the above witnesses. In sum, the record clearly supports a finding of just cause. Under the circumstances, I can have no choice but to sustain the terminations of these three officers.

The grievance of Gniotek and Sofronski

As previously indicated, the FOP has advanced, on behalf

of these two grievants, all of the arguments outlined and discussed earlier in connection with the first three grievants. In addition, it has stressed on behalf of Gniotek and Sofronski that the particular witnesses who had testified against them in the Martin trials. who were themselves vice figures and on whose sole testimony the Commissioner relied in terminating these two officers, were not introduced as witnesses in the present arbitration and were not subject to cross-examination on behalf of the instant two grievants.

In the view of the FOP, to base these two discharges on such hearsay evidence, from a trial where the grievants were not a party and had no opportunity to cross-examine, and to rely solely on the court record of that testimony, which is in itself an action contrary to cited court precedent, renders the discharges of these two officers completely insupportable. It also points out that in the initial stages of the present arbitration, the City itself had recognized the weakness of its position in the event it could not produce the aforementioned witnesses in the arbitration. As in the case of the other three grievants, the FOP requests prompt reinstatement with full back pay and benefits for Sofronski and Gniotek.

In reply to the above, the City has contended that the sworn testimony introduced from the Martin trials was valid evidence and had been found adequate in that criminal trial, where the burden of proof was much greater than in an arbitration case, to lend support to the conviction of top figures in this broad-based corruption conspiracy. The City cites various sources upholding the permissible use of hearsay evidence in a proceeding of the present type, particularly where the witness who was the source of the evidence is not available to the employer at the time of the arbitration; and it cites its extensive but as yet unsuccessful

efforts to subpoena in the present arbitration hearing the two witnesses who had implicated the instant two grievants in the Martin trials. In addition the City cites authority for an exception to the hearsay rule where statements of co-conspirators, as in this case, are involved and argues that, given the extensive City-wide conspiracy of corruption in the present case, the previously-sworn testimony of these now unavailable witnesses is clearly admissible for the truth of the matters asserted here by the City. Moreover, says the City, in Sofronski's case in particular, the "circumstantial evidence" regarding his personal, important role in the City-wide conspiracy can furnish an adequate basis in itself for upholding the termination.

Again, I have given careful consideration to the above opposing arguments of the parties; and my view in this instance must be that the City's basic contention that the termination of these two grievants can be upheld on the basis of the evidence thus far introduced in this case cannot be sustained.

The question is not, in my judgment, so much one of admissibility and weight of hearsay evidence as it is one involving the right of any terminated employee to confront his accuser and to *cross-examine* that accusing witness. While there are cases in arbitrationwhere circumstantial evidence alone has been found sufficient to uphold a discipline, the present case is not, in my judgment, such a one. As previously indicated, the accusing witnesses in the Christy-Pescatore-Garris cases did appear in the present arbitration and they were subject to cross-examination herein. That has not occurred in the instant two cases. For so serious a charge and so serious a discipline as here involved, my judgment must be that the grievants in arbitration are clearly entitled to confront and cross-examine the witnesses who have alone directly implicated them, before a discharge based on such

testimony can be upheld. That right is, in my judgment, simply too fundamental in this type of proceeding to be overlooked. Absent such an opportunity, I will find it necessary to sustain the present two grievances.

The City has requested additional time to bring the witnesses involved in the Gniotek-Sofronski terminations to the present arbitration. The arbitration hearings thus far in this case have been numerous, and the entire proceeding has extended over a great many months. The decision in this case has been delayed far beyond the usual time period in such cases. I must also recognize the possibility that the witnesses in question may not become available for this arbitration within the predictable future. Considering the unquestioned difficulties which the City has thus far encountered in bringing forth the witnesses in question, I will afford the City an additional two weeks from the date of the present decision to bring in such additional witness or witnesses before the arbitrator. Failing the latter, grievants Gniotek and Sofronski should be reinstated.

The question of monetary and related remedy aspects for them will be referred back to the parties for a four-week period to afford them the opportunity to agree upon a settlement of those aspects, either separately or possibly as part of a final and complete mutual resolution of all aspects of these two cases. As part of such an effort, also, the parties will have the right mutually to request an extension of the four-week period and in addition the aforementioned two-week period being afforded the City to bring in the previously discussed missing witnesses in these two cases.

Lastly, the award will also provide for a stay of the present ruling in the event criminal proceedings are instituted against either of the grievants prior to the full implementation of this award.

Appendix C

AMERICAN ARBITRATION ASSOCIATION

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

CITY OF PHILADELPHIA

-and-

FRATERNAL ORDER OF POLICE

CASE NUMBER: 14 390 1904 84 J

SUPPLEMENTAL AWARD OF ARBITRATOR

THE UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated July 1, 1984 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

The cases of grievants Gniotek and Sofronski in the present proceeding were dealt with by the arbitrator in his decision and award dated November 25, 1985 in this case. The various conditions and procedures set forth in item 2 of that award, relating to grievants Gniotek and Sofronski, have not resulted in a final disposition of the cases of these two individuals; and pursuant to the terms of that award, the Fraternal Order of Police has now returned the matter to the arbitrator. Based on the findings and determinations in the aforementioned award and opinion dated November 25, 1985, the FOP's present requested remedies for these two individuals, as set forth in the

communication of its counsel dated July 7, 1986, are granted. Accordingly, the City is directed to reinstate Louis Gniotek to his former position, with appropriate back pay retroactively to July 20, 1984, and to grant appropriate back pay to David Sofronski retroactively to November 15, 1984.

s/ Eli Rock
Arbitrator's signature (dated)
Eli Rock

August 15, 1986.

STATE OF
COUNTY OF

On this day of , 19 , before me personally came and appeared
to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

APPENDIX D—EXCERPT FROM RECORD BELOW—STATEMENT OF POLICE OFFICER ROBERT J. SCHWARTZ

STATEMENT OF: P/O Robert J. Schwartz

DATE & TIME: November 13, 1984 1125 hrs.

PLACE: Room #312, PAB Building

CONCERNING: On November 9, 1984 you were questioned by Capt. Burns and Sgt. Lupinetti by the Ethics Accountability Division regarding practices and procedures in North east Police Division. At that time you were not the target of a criminal investigation, and were, therefore not given criminal warnings. You are here today to give a more indepth statement concerning your activities in Northeast Police Division. Since your last statement, your former partner, George Bowie, has testified under oath on behalf of the Federal Government, implicating you in criminality while serving in Northeast Police Division. Because you now are the target of a criminal investigation, and are receiving the same rights and privileges of any citizen, you will be given Miranda warnings today.

IN PRESENCE OF: Inspector Andreas Hantwerker
Mr. John Straub
Captain Douglas Melanson
Anthony Malloy, Attorney for FOP

INTERROGATED BY: Inspector Andreas Hantwerker

RECORDED BY: Barbara J. McPherson, Clerk Steno III. Taken directly on the typewriter.

(Statement interrupted at 1132 hrs. for consultation with attorney)

Appendix D

1. Q. Do you understand that you have a right to keep quiet, and do not have to say anything at all? A. I do.

2. Q. Do you understand that anything you say can and will be used against you? A. Yes.

3. Q. Do you want to remain silent? A. Yes, on advice of my counsel. I am not saying anything because of the ongoing Federal investigation. I will respond to questions if you give me my charter warnings in regard to the false statements given by George Bowie.

4. Q. Do you understand that you have a right to talk with a lawyer before we ask you any questions? A. Yes.

5. Q. Do you understand that if you cannot afford to hire a lawyer, and you want one, we will not ask you any questions until a lawyer is appointed for you free of charge. A. Yes.

6. Q. Do you want to talk with a lawyer at this time, or to have a lawyer with you while we ask you questions? A. I do have a lawyer with me.

7. Q. Are you willing to answer questions of your own free will, without force or fear, and without any threats or promises having been made to you? A. No. On the advice of counsel.

Statement of: _____ Date: _____

Q. In answer to #3, read to you by Inspector Hantwereker, you stated that you would respond if given Charter warnings. At this stage of the investigation, it is incumbent upon us to give you Miranda warnings. If through your attorney, Mr. Malloy, anyone from his firm, or any other attorney, you wish to make inquiries

regarding possible immunity, which is the net result of Charter warnings, in return for your cooperation, they may contact me personally, at WA 5-1908, to explore this. We would like your help and cooperation in this matter.

STATEMENT CONCLUDED 1145 hrs. 11/15/84.

I HAVE READ THE FOREGOING STATEMENT CONSISTING OF 3 PAGES, INCLUDING THIS SIGNATURE PAGE, WHICH I AM SIGNING, AND IT IS TRUE AND CORRECT.

SIGNATURE s/ Illegible
ADDRESS
DATE & TIME 11-15-84 1201

WITNESSES:
s/ Andreas Hantwerker
s/ Capt. Douglas Melanson
s/ Capt. (Illegible)
s/ Illegible

APPENDIX E—EXCERPT FROM RECORD BELOW OF ARBITRATION PROCEEDING HELD FEBRUARY 18, 1985

AMERICAN ARBITRATION ASSOCIATION

CASE NO. 14 390190484J

FOP, LODGE #5

and

CITY OF PHILADELPHIA

GRIEVANCE: DISCHARGE OF POLICE OFFICERS LOUIS GNIOTECK, CARMEN CHRISTY, AUGUSTINE PESCATORE, LEONARD CARIS AND JOSEPH GIOFFRE

Philadelphia, PA, February 18, 1985

Arbitration in the above matter held in the Law Department, Municipal Services Building, Room 1520, at 10:45 a.m. on the above date before Karla J. Witkowski, a Registered Professional Reporter and a Notary Public of the Commonwealth of Pennsylvania.

BEFORE: ELI ROCK, ESQ., Chairman

FOSTER
COURT REPORTING SERVICE, INC.
1800 Architects Building - 117 S. 17th St.
Philadelphia, PA 19103
(215) 567-2670

* * *

Appendix E

TESTIMONY OF JOHN P. STRAUB

[Commencing at page 113]

A. I believe the general policy had been discussed and I had some input. I wasn't the—everybody didn't look at John Straub and say, "Should we do it or shouldn't we," and I said, "Yes."

Q. Who made the decision? A. It was under the City Charter and it was the Commissioner's decision.

Q. Was the Commissioner the one that exercised that prerogative? A. Was it the Commissioner who wanted to?

MR. TETI: Under the Charter and the Civil Service Regulations, it is only the Commissioner who may exercise that prerogative.

Q. You were the attorney at that time. Didn't Sambore confer with you and ask your advice? A. If you want to get into areas of attorney privilege, I was among several people that the Commissioner talked to.

MR. DeFINO: I have nothing further.

REDIRECT EXAMINATION

BY MR. TETI:

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Q. First of all, there was reference made to Charter warnings. Would you please indicate to the Arbitrator what the Charter warnings are and the circumstances in which they're used? [114] A. The Charter warnings come from the section that Mr. Teti mentioned before of the City Charter, 10/110, which basically puts an affirmative duties on the City people for cooperation.

BY THE CHAIRMAN:

Q. I'm familiar with that section. A. The police department has something that are called Charter warnings. They were compel statement warnings that had been given to officers when there were no criminal charges or no reason to give Miranda warnings.

It was felt, primarily by counsel representing officers, that they should be given Charter warnings, which is basically, you're an employee of the City of Philadelphia and you're being asked, as part of an official investigation, to cooperate. That was what Charter warnings were known as.

What this technically did was coerce statements on the part of the department coming from that officer. He was technically being threatened with loss of his position if he did not give a statement; therefore, that statement could not be used against him criminally, and there was cause to that effect.

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[115] It's really a protection that counsel for officers—and I'm not talking about these nine—over the past number of years felt—it's an added protection for the officers that the department can't play games and say, "There's no problem criminally, and we want you to cooperate," and he makes a statement and they turn around and lock him up. If it's a compelled statement, they can't use it against him

Q. What is the warning? A. The warning at the time—there was a format. I think Mr. Teti probably could get a copy of it, but it was a formal format that was used for officers that were being brought in.

See, normally in a case—not normally in a case, but Internal Affairs investigates a case at two levels: one is criminal and one is departmental level. If an officer is charged with doing something—unfortunately they're always something of a criminal sanction—whether it's an assault, somebody says the officer hit me, technically they're charging that officer with assault.

If there's any element of criminality, that officer is brought in and given Miranda [116] warnings. Once he is cleared, the District Attorney's Office says they don't want to prosecute, he'll be brought back and given Charter warnings.

Q. What are the Charter warnings? A. The

Appendix E

Charter warnings say you have to answer the questions.

Q. What does the 10/110 say? A. You have to cooperate.

Q. You read him that section, you're obligated under the Charter to cooperate with the department, and that's the warning, so if you don't cooperate, that can be a basis of taking discipline against you? A. That's the warning.

MR. TETI: That's it paraphrased. There's a piece of paper. We did not literally read Section 10/110.

BY MR. TETI:

Q. Why was Section 10/110 not used? A. Because of the pending investigation.

Q. Criminal investigation? A. Yes. Things weren't clear. We only give the Charter warnings when we're clear that no criminal action is going to be taken, because that statement is tainted.

Q. So, to your knowledge, is it within the. . .

TESTIMONY OF A. HANTWERKER

[Commencing at page 23]

A. Normally it was the Police Commissioner. I

believe on one occasion it was Deputy Commissioner Armstrong.

Q. So it was either Sambor or Armstrong? A. That's right.

Q. After you reported this to the department, to the Commissioner, were your instructions to notify these officers to report to either 3rd and Race in the situation that occurred in July and to the Police Administration Building in November with their commanding officers? A. My instructions were to have them report with their commanding officer. I chose the site.

Q. Prior to their reporting, a notice of suspension with intent to dismiss was prepared; is that correct? A. That's correct.

Q. Were you instructed to interview any of these plaintiffs at the time that they reported with their district commander? A. Yes.

Q. The sequence of events when these plaintiffs reported was that initially they were told that they were the subject of a criminal investigation being conducted by the Police Department; is that correct? [24] A. That's correct.

Q. Thereafter, they were—

MR. TETI: Rather than your phrasing it, why don't you ask him what the sequence of events

was. Do not ask him if your characterization is correct.

MR. MOLLOY: All right.

BY MR. MOLLOY:

Q. What was the sequence of events when these gentlemen reported? A. With the exception of Eugene Sullivan, the others were instructed through their commanding officers to report with their commanding officers to whichever the selected site was at that time. They were told upon their arrival and in the presence of their commanding officer and in the presence of their counsel, in most cases you with the exception of one case, that they were the subject of a criminal investigation. They were given their Miranda Warnings and asked the related Miranda questions. Each, to the best of my recollection, upon reaching the third Miranda question, that is do you wish to remain silent, answered in some manner or another yes, on the advice of my counsel.

[25] At that time, the interview was terminated.

Q. In getting your assignment to be the departmental person dealing with these plaintiffs, were you specifically instructed to give them their Miranda Warnings? A. I don't recall.

Q. Were you directed by either the

Commissioner, or in his absence Deputy Commissioner Armstrong to take the statement of these officers? A. I was instructed to interview them.

Q. Are you familiar with Home Rule Charter Warnings? A. Yes.

Q. In your instructions from either the Commissioner or the Deputy Commissioner, were you told not to give Home Rule Charter Warnings? A. I don't specifically recall.

Q. To your knowledge, during the course of any of those investigations, did the subject of Charter Warnings come up? A. Yes.

Q. Can you elaborate on that? A. One of the individuals, and I don't recall which at this point, made a statement in response to [26] the third Miranda question that, in context, he would respond to further questions if given his Charter Warnings, his Home Rule Charter Warnings.

Q. Prior to the creation of Ethics Accountability, what unit or units or organizational functioning group within the Police Department performed the function of investigating corruption or any form of criminality engaged in by police officers? A. The Internal Affairs Bureau.

Q. During the course of your employment, did you ever work for the Internal Affairs Bureau?

A. Yes.

Q. What position did you hold within the Internal Affairs Bureau? A. I was staff investigator.

Q. For how long were you a staff inspector? A. Approximately ten months.

Q. During what time period was that if you can recall? A. Early 1981, January or February through about December, give or take of the same year.

Q. During the time period that you were staff inspector, did you ever have the occasion to investigate an allegation of criminal conduct on the part [27] of a police officer? A. Yes.

Q. What was the procedure followed by you at that time with respect to questioning the officer? A. I don't fully understand the question.

Q. Assuming that there is an allegation—I will make this a hypothetical but I know it is a common occurrence—that a narcotics officer while serving a warrant is alleged to have stolen money from the person who was the recipient of the warrant and this is reported to the Internal Affairs Bureau. Is the procedure within the Internal Affairs Bureau to initially conduct an investigation of the circumstances surrounding the allegation? A. Yes.

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Q. Am I not correct in stating that normally the police officer who is the subject of that accusation is called in, interviewed by a police staff inspector, advised of the allegation against him or her, and initially read their Miranda Warnings? A. At some point in the investigation, yes.

Q. When the officer is read Miranda Warnings, is it not the usual procedure that the District Attorney has not determined whether to prosecute or [28] not to prosecute? A. Yes.

Q. Thereafter, after the employee is read their Miranda Warnings, are they not subsequently called back and either given Charter Warnings or locked up depending upon the results of the investigation? A. In most cases.

Q. You indicated that you served a notice of suspension with intent to dismiss upon Chief Inspector Sullivan; is that correct? A. That's correct.

Q. When you served a notice with Inspector Sullivan, did you advise him at that time that he was the subject matter of a criminal investigation if you can recall? A. I don't recall the specific conversation that took place. Chief Inspector Sullivan was made aware at that point of the reason for our visit to his home.

When you went to Sullivan's home, were you following direct orders? A. Yes.

Q. When you went to his home, were you told not to conduct an interview? A. No.

MR. MOLLOY: Off the record.

* * *

[37] BY MR. MOZENTER:

Q. Are you familiar with the investigation of Officers Trudell and Verdon? A. Not specifically.

Q. Did you have any part to play in that investigation? A. Not that I recall.

Q. Did you interview Officers Trudell and Verdon? A. Not that I can recall.

MR. MOZENTER: I just wanted to get it clear. I do not have any other questions.

MR. MOLLOY: I have several more.

BY MR. MOLLOY:

Q. At the time that you tendered the notice of suspension with intent to dismiss to these officers, was there any formal written charges filed against that officer?

MR. TETI: What do you mean by filed?

MR. MOLLOY: 18s.

MR. TETI: For the record, tell me what an 18 is.

MR. MOLLOY: 18s are disciplinary forms.

THE WITNESS: Not at the time that [38] they were given the notice of suspension with intent to dismiss.

BY MR. MOLLOY:

Q. Do you know who prepared the 18s? First of all, you know what a form 18 is; is that right?

MR. TETI: I do not. I want you to show me what you mean by an 18.

(Whereupon, a brief recess was held.)

MR. MOLLOY: Let the record note that I have a form from City Hall, a form 75-18 which is captioned Statement of Charges Filed and Action Taken. I am going to show this to Inspector Hantwerker. The form that I am showing him has to deal with Police Officer Swartz.

BY MR. MOLLOY:

Q. Inspector, are you familiar with a form 75-18? A. Yes.

Q. In terms of departmental procedure, is that the formal statement of charges prepared against

an officer? A. Yes.

Q. At the time these plaintiffs, the police officers were served with their notice of suspension with intent [39] to dismiss, they were not given a formal statement of charges; is that correct? A. That's correct.

Q. Do you know who prepared the formal statement of charges with respect to each of the individual plaintiffs? A. The commanding officer of the individual is responsible for preparing that document.

Q. So that with respect to Chief Inspector Sullivan, his 18s were prepared I guess directly by the Deputy Commissioner? A. They were prepared by the Deputy Commissioner.

Q. With respect to the other plaintiffs, they were prepared by their commanding officer? A. To the best of my knowledge.

Q. Did you participate in the preparing of these 18s for these plaintiffs? A. Only to the extent that I provided the commanding officer with the information that we had received from the trial.

Q. Neither you nor anybody in command instructed these commanding officers as to how the 18s were prepared? A. Only that they were to be prepared.

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[40] Q. After serving these plaintiffs with their notice of suspension with intent to dismiss, in terms of farther departmental procedure specifically the 75-18, that was all out of your hands; is that correct? A. That's correct.

Q. Is that with respect to the disciplinary actions taken against these individuals? Your responsibility ended when you served them with the notice of suspension with intent to dismiss? A. That's correct.

MR. MOLLOY: That is it. Thank you.

MR. TETI: I have no questions.

(Witness excused)

JOHN P. STRAUB having been duly sworn, was examined and testified as follows:

BY MR. MOLLOY:

Q. John, are you employed by the City of Philadelphia? A. Yes.

Q. What is your present job classification? A. I am paid by the City Solicitor's office. I am the Deputy City Solicitor.

APPENDIX F—STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

PROVISIONS OF THE UNITED STATES CONSTITUTION

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix F

PENNSYLVANIA CIVIL SERVICE PROVISIONS

17—DISMISSALS, DEMOTIONS, SUSPENSIONS AND APPEALS

17.01 DISMISSAL, DEMOTION AND SUSPENSION. Any dismissal or demotion after the completion of the required probationary period of service, or suspension of any employee in the Civil Service shall be for just cause only.

At least ten (10) days before the effective date of dismissal or demotion, the appointing authority must notify the employee, in writing, of his intention to dismiss or demote and the reasons therefor. The notice to the employee must state the specific reasons for the dismissal or demotion and summarize the facts in support thereof with sufficient particularity to allow the employee to prepare a defense to the charges. A copy of such motion shall forthwith be filed with the Director. Within ten (10) days following service of the notice, the employee may reply thereto in writing. At the same time the employee shall file a copy of such a reply with the Director.

At any time within twenty (20) days after the end of the ten (10) day period the appointing authority may, if he desires to take such action, notify the employee in writing of the effective date of the dismissal or demotion and the specific reasons therefor. The appointing authority shall forthwith file a copy of this notice with the Director. If such

a notice of dismissal or demotion is not sent within the twenty (20) day period, the original notice of intention shall lapse and be of no effect.

17.02 DISMISSAL. An employee in the Civil Service may be dismissed for just cause at any time by the appointing authority. Notice must be given as provided in Section 17.01 of this Regulation.

17.03 DEMOTIONS. The appointing authority may demote an employee whose performance of his required duties falls below standard or for disciplinary purposes. Notice must be given as provided in Section 17.01 of this Regulation.

17.031 DEMOTIONS, TEMPORARY. With the employee's consent, an appointing authority may temporarily demote an employee with permanent Civil Service status for reasons of health or temporary disability or for disciplinary purposes when such procedure is more advantageous to both employee and the employing department than a leave of absence or separation from the City service. A temporary demotion, to which the employee involved consents, is not appealable to the Commission. A temporary demotion must be for a stipulated period at the termination of which the employee is to be reinstated in his former position; provided however, such demotions for reasons of health or temporary disability may, with the consent of the employee, be extended for additional periods.

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17.04 SUSPENSIONS. The appointing authority may suspend an employee without pay from his position at any time for just cause. Notice of suspension shall be given to the employee and at the same time to the Director. Each suspension without pay shall not exceed thirty (30) calendar days.

No appointment except a temporary appointment shall be made to fill the vacancy during a period of suspension.

17.05 REDUCTION IN PAY. An appointing authority for just cause may reduce the salary of an employee within the pay range prescribed for the class. In the case of a permanent employee, notice of intention to effect a reduction in pay and the reasons for such action shall be given to the employee and to the Director ten (10) calendar days prior to the effective date of the reduction. The permanent employee so affected may appeal to the Commission as in cases of demotion.

17.06 APPEALS. The Commission shall hear and dispose of appeals as provided in this section.

17.061 PROCEDURE ON APPEALS. Any employee who after satisfactorily completing his probationary period of service, is dismissed, demoted, or suspended for more than ten (10) calendar days in any one year, may, within thirty (30) calendar days after such dismissal, demotion, reduction in pay

or suspension, appeal to the Commission for review thereof. Every appeal shall be heard promptly. Upon such review, both the appealing employee and the appointing authority involved shall have the right to be heard publicly and to present evidence; but technical rules of evidence shall not apply. The findings and decisions of the Commission shall be in writing and shall be certified to the Director. On the day the findings and decisions of the Commission are entered a copy thereof shall be mailed to the appellant by ordinary U.S. mail, postage prepaid, to the address furnished in the appeal or stated by him of record at the hearing, and to his attorney of record if he was represented before the Commission.

17.062 DISPOSITION OF APPEALS. If the Commission sustains the appeal on the ground that the action complained of was taken by the appointing authority for any political, religious or racial reason, or for labor union activity lawful for municipal employees, it shall order the employee to be reinstated to his former position without loss of pay for the period of his suspension. In all other cases where the Commission sustains the appeal of the employee it shall order the reinstatement of the employee in his former position, with or without loss of pay, or direct that he be appointed to a position of equal status in the same department, board or commission, with or without loss of pay.

Appendix F

If the Commission overrules the appeal of the employee, it shall confirm the action of the appointing authority which shall be final as of the date it was taken.

Findings and decisions of the Commission and any action taken in conformance therewith and as a result thereof shall be final and there shall be no further appeal on the merits, but there may be an appeal to the courts on jurisdictional or procedural grounds.

17. 063 REHEARINGS.

17.0631 *Reasons for Rehearing.* The Commission, in its discretion, may grant a rehearing upon application of either party filed with the Commission not later than thirty (30) days after the decision was entered, but only on one or more of the following grounds:

a. The Commission based its decision on an error of law.

b. There was no evidence before the Commission to sustain a finding of a fact necessary to the validity of the decision.

c. The moving party has after-discovered evidence which was unknown

to him and which could not with reasonable diligence have been discovered and produced at the time of the hearings.

17.0632 *Form of Application for Rehearing.* The application shall state with particularity the basis therefor. If the application is based on matters described in clauses (a) and (b) of section 17.0631, it shall be accompanied by a memorandum in support of the applicant's position. If the application is based on matters described in clause (c) of Section 17.0631, it shall have annexed thereto affidavits stating in detail the evidence to be produced should the rehearing be granted, why such evidence was not and could not have been presented at the original hearing and it shall be accompanied by copies of any documents, exhibits, etc. proposed to be presented at the rehearing. A copy of the application and accompanying memorandum, affidavits and exhibits shall be served on the opposing party or his counsel, and proof of service shall be filed with the Commission within five days of the filing of the application.

17.0633 *Answer.* The opposing party shall have fifteen (15) days after service

within which to file an answer to the application and, if the application is based on matters described in clauses (a) and (b) of Section 17.0631, a memorandum in opposition thereto shall accompany such answer.

17.0634 *Action of the Commission.* The Commission may fix a hearing or oral argument, or, without so doing, may decide the issues raised and affirm or modify the decision previously entered by it, or may dismiss the application, as it shall deem just under the circumstances. Such action as it may take shall be final and not subject to further review by the Commission.

17.0635 *Effective Date.* This section shall apply only to cases decided by the Commission after its effective date, and to cases in which appeals have been taken to Courts of record which, on the effective date of this section, are still not finally disposed of, but only if such appeals are withdrawn at or before the making of the application for rehearing.

17.07 SEPARATION DUE TO NON-SERVICE INCURRED DISABILITY. An employee refused by an appointing authority on the advice of the Chief of the Municipal Medical Dispensary the right to perform the duties of his position because

of a non-service incurred physical condition or medical disability shall have his employment terminated or continued in accordance with the following provisions:

17.071 EMPLOYMENT STATUS DURING LEAVES. In the event the employee concedes his disability or physical condition and remains absent from work on sick leave, vacation leave, compensatory time, leave without pay, or any other permissive leave available to him, the responsibility of obtaining such leaves or renewals thereof is solely the employee's.

17.072 MEDICAL REEXAMINATIONS. If, as and when the employee believes he has recovered and/or is able to return to work, he may apply to the Chief of the Municipal Medical Dispensary for examination or reexamination. Such an application made to that officer by personal appearance at this office prior to the expiration of a leave with or without pay shall suspend the application of Regulation 22.021 until five (5) days after notice of the determination by that officer is mailed to the employee.

17.073 SEPARATIONS AND APPEALS. A determination by the Chief of the Municipal Medical Dispensary that the employee, following reexamination as provided in subsection 17.072, is still disabled or in

unsatisfactory physical condition shall serve as authorization for the appointing authority to take one or more of the following actions:

17.0731 If it is considered appropriate, offer the employee, if he applies therefor within five (5) days of the offer, a leave of absence without pay for a reasonable period based on the advice of the Chief of the Municipal Medical Dispensary, or

17.0732 Offer the employee, if he applies therefor within five (5) days of the offer, a leave of absence without pay for a reasonable period to permit him, if possible, to be employed in another position compatible with his disability or physical condition, either on the basis of a transfer or voluntary demotion, or

17.7333 Offer to accept the employee's resignation in good standing (with the possibility of reinstatement) if submitted within five (5) days of the offer, or

17.0734 If the employee fails to accept such offer as may be made under the provisions of subsections 17.0731, 17.0732, or 17.0733, if any, or if no such offer is made, the appointing authority shall dismiss the employee with the appropriate notice of intention to dismiss and dismissal notices.

Appendix F

PHILADELPHIA HOME RULE CHARTER PROVISIONS WITH ANNOTATIONS

Section 7-303. Dismissal, Demotion and Suspension. Any dismissal or demotion after the completion of the required probationary period of service, or suspension of any employee in the civil service shall be for just cause only.

Section 7-401. Contents. The regulations shall provide for:

(p) Suspensions from the service for not longer than thirty days;

(q) Discharge or reduction in rank or grade after appointment or promotion is completed only after the person to be discharged or reduced has been presented with the reasons for such discharge or reduction, specifically stated, and has been allowed a reasonable time to reply thereto in writing. The reasons and the reply shall be filed with the Personnel Director:

ANNOTATIONS

Subsection (p). "Suspensions are temporary separations most commonly used by appointing authorities as a means of effecting proper disciplinary control over subordinate employees, who have violated some departmental rule or who have let down in their performance and need

jacking up. It is used as a disciplinary act intermediate between a verbal reprimand and an outright dismissal. The time limitation on summary suspensions is intended to confine it to this use. Where a suspension is to extend for more than a short period, the appointing authority should be required to resort to the procedure provided for in case of a dismissal." (A Model State Civil Service Law, p. 15).

Subsection (q). Employees discharged or demoted have a right of appeal to the Civil Service Commission. See Annotation to Section 7-201. This subsection is necessary so that they may know the reasons for the action taken and on that basis decide upon the question of appealing.

CHARTER WARNINGS

This is to advise you officer, that this is an internal administrative investigation related to the performance of your duties as a police officer. It is not a criminal investigation. You have all the rights and privileges guaranteed by the laws of the Commonwealth of Pennsylvania and of the United States of America, including the right to be represented by counsel at this inquiry and the right to remain silent. You may, however, be subject to disciplinary action, including dismissal, by the Police Department for failure to answer material and relevant questions relating to the performance of your duties as an employee of the City of Philadelphia.

The Philadelphia Police Department will not use this statement or the fruits thereof as part of any criminal investigation

against you. If this statement is requested by any other law enforcement agency, you will be notified before it is provided to that agency. In addition, the requesting agency will be given a copy of this signed form in the event the statement is provided.

SIGNATURE _____

DATE _____

WITNESS _____

42 U.S.C. § 1983

Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. As amended Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

No. 86-1563

In the Supreme Court of the United States

OCTOBER TERM, 1986

LOUIS GNIOTEK, CARMEN CHRISTY, LEONARD GARRIS, DAVID SOFRONSKI, AUGUSTINE PESCATORE, and FRATERNAL ORDER OF POLICE, LODGE NO. 5,
Petitioners

v.

CITY OF PHILADELPHIA, W. WILSON GOODE, LEO BROOKS, GREGORE J. SAMBOR, ANDREAS HANTWERKER, JOHN STRAUB and BARBARA MATHER,
Respondents

Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUSAN SHINKMAN
Divisional Deputy City Solicitor
City of Philadelphia Law Department
Counsel for Respondents
1530 Municipal Services Building
Philadelphia, PA 19102-1692
(215) 686-5268

JESSE MILAN, JR.
Chief Assistant City Solicitor
RALPH J. TETI
Chief Deputy City Solicitor
HANDSEL B. MINYARD
City Solicitor

SMITH-EDWARDS-DUNLAP COMPANY, 2867 E. ALLEGHENY AVENUE, PHILADELPHIA, PA 19134 (215) 425-8800

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UNITED STATES CONSTITUTION

In the Supreme Court of the United States

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STATEMENT OF THE CASE

In 1984, some fifteen police officers in the City of Philadelphia Police Department (hereinafter, the "City" or the "Department") were indicted on federal charges of bribery and corruption under the R.I.C.O. Act in connection with the performance of their police duties. The criminal trials for those officers were bifurcated into two proceedings, *U.S. v. Martin* and *U.S. v. Volkmar,* Cr. No. 84-106 (E.D. Pa.). During the lengthy hearings in those matters, Petitioners Gniotek, et al. (hereinafter, "Petitioners" or "Gniotek, et al.") were identi-

fied by fellow officers, or others appearing under oath as witnesses for the prosecution, as also the recipients of unlawful bribes. Those witnesses testified that each Petitioner had received bribes from them or other known vice operators in Philadelphia for several years. The witnesses further testified that Petitioners had accepted this money in return for their promise not to enforce various vice laws of the Commonwealth of Pennsylvania. Though these witnesses appeared under a grant of immunity from the United States Attorney's Office, that immunity did not protect them against prosecution for perjury. At the trial, their testimony was credited by the jury which convicted all of the police defendants in that matter.

During the *Martin* proceedings, prosecution witness Eugene Boris, a former police officer, testified that while assigned to the Fifth Police District, Petitioner Louis Gniotek regularly accepted money from him to protect illegal numbers writers from arrest. Petitioners Garris, Christy and Pescatore were similarly identified as the regular recipients of bribes from Albert Ricci, a defendant in that case, who pleaded guilty to the charges against him. Former Police Lieutenant Joseph Alvaro corroborated those allegations against Garris, Christy and Pescatore by testifying that he knew each to have been the recipient of payments from vice figures while he worked with them in the Philadelphia Northwest Police Division Vice Squad. Petitioner Sofronski was identified by Robert Sadowl, an admitted vice figure. Sadowl testified that he made payments directly to Sofronski to permit the operation of illegal poker machines within Sofronski's assigned district.

The proceedings in the *Martin* trial were monitored daily by officers from the Police Department. When testimony was offered stating that a current police officer had engaged in corrupt conduct, his name and the facts regarding his activities were transcribed and brought to the immediate attention of the Police Commissioner by those officers assigned to the courtroom.

The Commissioner considered the testimony of the aforementioned witnesses very reliable because it was offered un-

der oath, in open court, by witnesses on behalf of the federal government. He further believed the United States Attorney's Office acted in good faith in presenting testimony about officers who were not indicted as part of the government's case, that the testimony was truthful and, most importantly, that it was accepted as truthful by the court.

Following the Commissioner's review of the testimony, each Petitioner was instructed to report with his Commanding Officer to Inspector Andreas Hantwerker, Chief of the Department's Ethics and Accountability Division (E.A.D.).[1] Each reported individually with his attorney at a designated time. At their E.A.D. interview, each was immediately notified by Inspector Hantwerker and Deputy City Solicitor John P. Straub[2] that he had been identified in federal court testimony as the recipient of illegal bribes in connection with the performance of his duties. They were further advised that as a result of that testimony they were now the subjects of a criminal investigation. Each Petitioner was immediately given his *Miranda* warnings by Inspector Hantwerker. Next, each was asked whether he desired to give a statement concerning the departmental and criminal charges pending against him. In response to that question, Petitioners chose to remain silent on advice of counsel. Each Petitioner then signed a statement confirming his understanding of the *Miranda* warnings and his corresponding decision to remain silent. After signing their statements, Petitioners received a written Notice of Suspension with Intent to Dismiss for the conduct described above. Petitioners were then placed immediately on suspension. (Petitioners' Appendix B at 15a).

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1. The Ethics and Accountability Division acts as the Department's own check on the ethics of all officers' activities and on the general propriety of police conduct. It is charged with the receipt of complaints regarding officers and the investigation of improper conduct. It is not related to the Philadelphia District Attorney or any other prosecutorial agency.

2. The Philadelphia City Solicitor's Office is not a prosecutorial agency. Rather, it represents the City in civil matters, and provides legal advice to the City's departments and agencies, including the Police Department. Philadelphia Home Rule Charter §§4-400, 8-410.

Several days later, Petitioners each received a Notice of Intent to Dismiss which outlined again the facts relating to the trial court testimony and specified the various departmental directives and policies which they violated. The Notices included a statement advising the recipient of his right under the Philadelphia Civil Service Regulations to notify the Police Commissioner in writing within ten (10) days of receipt of the Notice of any reason which in his belief indicated that his intended dismissal was unjustified. No such letter was received by the Commissioner or the department's personnel director from any of the Petitioners within that ten day period. Consequently, Petitioners were dismissed from the Department for the reasons set forth in the Notice of Intent to Dismiss.

In depositions taken during discovery, each Petitioner testified that he believed the exclusive reasons for his dismissal to be the reasons enumerated in the Notices of Intent to Dismiss and Notices of Dismissal relating to violation of department policies. Petitioners further admitted that they did not believe that their dismissals were in any way related to *Miranda* warnings or their invocation of their Fifth Amendment rights. (Petitioners' Appendix B at 23a).

Through their collective bargaining representative, the Fraternal Order of Police (hereinafter, the "FOP"), Petitioners initiated separate grievances challenging their dismissals from the Department. The grievances were filed pursuant to the FOP Collective Bargaining Agreement with the City. Under that Agreement, Petitioners had the right to request a first-level hearing before the Police Commissioner himself. All Petitioners waived that right in favor of submitting their grievances to binding arbitration with the American Arbitration Association, an option also available under the FOP Agreement. Hearings for all the individual grievants were consolidated before Arbitrator Eli Rock.

At the arbitration proceeding, the City produced former Officer Albert Ricci, who testified that he had passed bribe monies from various vice figures to Petitioners Garris, Christy and Pescatore. (Petitioners' Appendix C at 62a). The

City also produced the testimony of former Vice Lieutenant Joseph Alvaro, who corroborated Ricci's testimony. *Id.*

On November 25, 1986, Arbitrator Rock issued an Opinion and Award sustaining the dismissal of Petitioners Garris, Christy and Pescatore, tabling the grievances of Officers Gioffre, Sullivan, Schwartz and Stansfield[3] and ordering the conditional reinstatement of petitioners Sofronski and Gniotek. The FOP subsequently appealed the portion of the Arbitrator's Award denying the grievances of Garris, Christy and Pescatore to the Philadelphia Court of Common Pleas. Similarly, the City appealed that portion of the Award requiring the conditional reinstatement of Sofronski and Gniotek to Common Pleas Court. Those appeals are currently pending.

In April 1985, Petitioners filed the instant action in the United States District Court for the Eastern District of Pennsylvania pursuant to 42 U.S.C. §§1983, 1985, 2201, the Fifth and Fourteenth Amendments, and various sections of the Commonwealth of Pennsylvania Constitution. In their Complaint, Petitioners alleged that the City of Philadelphia and several City officials violated their rights to due process of law regarding their dismissals from their positions with the Philadelphia Police Department and denial of pensions benefits. On May 13, 1985, the City filed a Motion to Dismiss or in the Alternative for Summary Judgment on nine different grounds. A Cross-Motion for Summary Judgment was then filed by Petitioners, with an *amicus curiae* appearance by the American Civil Liberties Foundation (hereinafter, "ACLF"), and a Reply Brief by the City. On March 6, 1986, Judge Raymond J. Broderick granted the City's Motion by:

1) dismissing Petitioners' §1985 claim,

2) dismissing Petitioners' claim regarding pension benefits,

---

3. Officers Gioffre, Sullivan, Schwartz and Stansfield were parties to the instant litigation in the District Court, but not to the present appeal. Prior to their appeal to the Third Circuit, Gioffre, Sullivan and Schwartz were indicted and convicted of similar R.I.C.O. charges. (Petitioners' Appendix B at 17a).

3) granting summary judgment against Petitioners' procedural due process claims,

4) granting summary judgment against Petitioners' Fifth Amendment claim,

5) granting summary judgment against Petitioners' State law claim that they were not dismissed from their jobs for "just cause."

(Petitioners' Appendix B).

After entry of the District Court's decision, Petitioners perfected an appeal to the Third Circuit Court of Appeals raising only the procedural due process and the Fifth Amendment issues. (Petitioners' Appendix A at 4a).

After receipt of Briefs by Petitioners, the City, and the ACLF as *amicus curiae* and oral argument, the Third Circuit issued an Opinion on December 24, 1986 affirming the District Court's grant of the City's Motion for Summary Judgment and held that the City provided Gniotek, et al. with adequate pre-deprivation due process.[4] (Petitioners' Appendix A). Petitioners now seek the instant Writ of Certiorari in the United States Supreme Court.

SUMMARY OF ARGUMENT

The instant Petition for Writ of Certiorari should be denied because Petitioners never raised before the Court of Appeals their argument that the City did not follow its "standard procedure" with regard to them. Further, Petitioners never raised on appeal their argument that the pre-deprivation opportunity to respond afforded them was a "custodial interrogation" which did not satisfy the due process requirement of *Cleveland Bd. of Educ. v. Loudermill.* In addition, the

4. The District Court made no specific ruling in its Opinion regarding Gniotek, et al.'s pre-suspension due process rights vis-a-vis their termination due process. The Third Circuit specifically held that Gniotek, et al. were entitled to notice and an opportunity to respond prior to suspension as well as termination, but held that the procedure described herein was adequate and constitutional for both the suspension and termination of Petitioners.

instant Petition should be denied because no conflict among the Circuit Courts exists regarding the Third Circuit's interpretation of *Loudermill,* and the facts of this case are too narrow to warrant a constitutional analysis by this Court. Finally, the Petition should be denied because the Third Circuit did not misapply this Court's prior holdings in *United States v. Rylander* and *Williams v. Florida.*

ARGUMENT

I. Petitioners Never Raised On Appeal The Question Of Whether The City Failed To Follow "Standard Procedure" For Confronting And Investigating Officers Accused Of Criminal Misconduct.

The long established policy of this Court is to refuse to hear or decide issues which petitioners have failed to raise before in the Court of Appeals. *Neely v. Eby Construction Co.,* 386 U.S. 317, 330, 18 L.Ed.2d 75, 85 (1967). This practice has been defined by the Court itself as "our normal policy of not considering issues which have not been presented to the Court of Appeals," *id.,* and has been applied many times over to arguments and theories raised on appeal to the Supreme Court but not in the courts below. *Neely, supra; Cort v. Ash,* 422 U.S. 66, 73, n.6, 45 L.Ed.2d 34, n.6 (1975). *See Miree v. DeKalb County,* 433 U.S. 25, 34, 53 L.Ed.2d 557, 566 (1977); *United States v. Lovasco,* 431 U.S. 783, 788, n.7, 52 L.Ed.2d 752, 758, n.7 (1977).

In their Petition for Certiorari, at pages 11-14, Petitioners argue that the City's Police Department failed to follow, with regard to Petitioners, its "standard investigative procedures" when officers are accused for disciplinary purposes of criminal misconduct. Such a theory includes far more than the self-incrimination and *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), procedural due process issues described by the Third Circuit as the only issues raised by Petitioners for review. (Petitioners' Appendix A at 4a). Indeed, the Third Circuit's entire Opinion is predicated upon those narrowly defined issues and no

other. Nowhere in their briefs to that Court or in oral arguments did Petitioners attempt to focus the Court on the issue of whether the District Court erred by not finding that the City failed to apply "standard procedure" in investigating the allegations of criminal misconduct proffered against them. (Petitioners' Appendix A). Had such an issue been raised, the court below might have been required to make an equal protection analysis; or at the very least, remand to the District Court for additional findings of fact. However, in the absence of Petitioners raising that issue, the Third Circuit could not and did not determine the merits of that issue.

Therefore, because Petitioners have newly raised an issue not presented by them for review before the Court of Appeals, this Court should follow its normal practice of rejecting Petitioners' request that this matter be reviewed by this Court. *See Neely, supra; Cort v. Ash, supra.*

II. Petitioners Never Raised On Appeal Their Theory That The *Loudermill* Pre-Deprivation Opportunity To Respond To The Accusations Against Them Was In Reality A "Custodial Interrogation" Which In And Of Itself Could Not Satisfy The *Loudermill* Due Process Requirements.

In their Petition for Writ of Certiorari, Petitioners expound at great lengths their theory that the E.A.D. interview with the Police Inspector was in reality a criminal "custodial interrogation" which, *arguendo,* could not be a meaningful administrative pre-deprivation opportunity to respond under *Loudermill.* This theory, however, goes beyond any of the arguments preserved by Petitioners before the Court of Appeals. (Petitioners' Appendix A).

In its Opinion, the Third Circuit took note of the only two issues pressed by Petitioners regarding the sufficiency of the E.A.D. interview as a pre-deprivation opportunity to respond under *Loudermill.* The Court summarized those issues as (1) whether a meaningful opportunity to respond was afforded Petitioners where their responses might have been used against them because they were the subjects of a criminal

investigation, and (2) whether the City unconstitutionally burdened their right against self-incrimination by forcing them to choose between responding to the charges or losing their job. (Petitioners' Appendix A at 9a). Nowhere did the Third Circuit indicate that it had been asked to review the question now posed of whether the E.A.D. interview was in reality a criminal "custodial interrogation" which by its very nature could not be an administrative disciplinary pre-deprivation opportunity to respond.[5] As a result of Petitioners' failure to raise this theory, the Third Circuit's Opinion addresses only the self-incrimination aspects of the E.A.D. interview, and not the newer question raised in the instant Petition that a "custodial interrogation" could not "serve as an employment termination hearing." (Petition for Writ of Certiorari at 15).

Therefore, because Petitioners raise a new issue on appeal which was not raised before the Court of Appeals, this Court should reject that issue from the instant matter. *Neely, supra; Cort v. Ash, supra.*

III. No Conflict Exists Among The Circuits Regarding The Third Circuit's Interpretation Of *Loudermill* And Public Employees' Rights Under The Fifth Amendment.

Historically, the Supreme Court has obligated itself to avoid deciding constitutional issues except where "avoidance becomes evasion." *Rice v. Sioux City Cemetery,* 349 U.S. 70, 74, 99 L.Ed. 897, 901 (1954). *See Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 341, 80 L.Ed. 688, 707 (1936). This Court has noted, however, that it will grant certiorari where a particular case would allow it to resolve decisions among the Courts of Appeals which are in conflict. *Stellos Co. v. Hosiery Motor-Mend Corp.,* 295 U.S. 237, 238-39, 79 L.Ed.

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5. The ACLF in their brief before the Third Circuit did argue the above theory. However, as *amicus curiae,* the ACLF was not a party to the proceedings or appeals below. *International Union v. Scofield,* 382 U.S. 205, 15 L.Ed.2d 272 (1965).

1414, 1416 (1935); *International Union v. Scofield,* 382 U.S. 205, 15 L.Ed.2d 272 (1965).

In the instant Petition for Writ of Certiorari, Petitioners have nowhere alleged that the decision of the Third Circuit is in any way inconsistent with decisions among the other Circuits regarding procedural due process under *Loudermill* or the right against self-incrimination in pre-deprivation hearings. Quite the contrary, the Third Circuit's decision is the first among the Circuits concerning these issues since this Court's decision in *Loudermill* in 1985. In the absence of such conflict, this matter does not warrant the expenditure of this Court's resources. Therefore, the instant Petition for Writ of Certiorari should be denied. *See S.S. Montrosa v. Carbon Black Export, Inc.,* 359 U.S. 180, 3 L.Ed.2d 723 (1959).

IV. The Facts Of This Matter Are Far Too Narrow To Warrant Interpretation By This Court.

This Court has cautioned that it should avoid deciding federal questions which arise merely in an "episodic" context. *Rice v. Sioux City Cemetery,* 349 U.S. at 74, 99 L.Ed. at 901. The facts of this matter are clearly so singular as to have little or no potential impact on other Circuits should this Court render a full opinion. As set forth fully in both Petitioners' and the City's Statements of the Case, this matter involves the unusual situation where police officers were named by live witnesses in a court proceeding, to which they were not parties, as the recipients of illegal bribes. More particularly, this case concerns police officers charged in an administrative context by their employer, a law enforcement agency, with misconduct of a criminal nature. This unfortunate situation was generated only by the unique nature of the Police Department's role as the employer of persons charged with high ethical standards and enforcing the law.

This Court's Opinion in *Loudermill* acts as a guide for all government employers, including Police Departments, on the necessity of providing pre-deprivation notice and an opportunity to respond. The Third Circuit clearly evaluated the instant E.A.D. interview under the guidelines of *Loudermill* and

determined that the constitutional rights of Petitioners were protected. An additional decision by this Court, addressing solely the unique facts of this case would simply duplicate this Court's efforts in articulating the due process rights of public employees already stated in *Loudermill* and add little in the way of insight for the Circuit and District Courts.

Therefore, because the factual situation in this matter is so unique, this Court should avoid employing its judicial resources in reviewing a matter of narrow scope and significance.

V. The Third Circuit Did Not Create An Unlawful Distinction Between This Court's Decisions In *Garrity v. New Jersey, United States v. Rylander,* Or *Williams v. Florida.*

Petitioners contend that the Third Circuit has created an impermissible distinction in its Opinion between *Garrity v. New Jersey,* 385 U.S. 493, 17 L.Ed.2d 562 (1967) and *United States v. Rylander,* 460 U.S. 752, 75 L.Ed.2d 521 (1983) and *Williams v. Florida,* 399 U.S. 78, 26 L.Ed.2d 446 (1970). This theory, however, is not supported by the record from the courts below or by a correct interpretation of the Third Circuit's Opinion in this matter.

In *Garrity, supra,* police officers were accused of criminal misconduct with regard to matters occurring in New Jersey Municipal Courts. During the Attorney General's investigation, the officers were advised that they had the right to remain silent, that anything they said could be used against them, and that if they refused to answer questions they would be subject to removal from office. *Id.* at 494, 17 L.Ed.2d at 564. The officers answered the questions, but with no specific grant of immunity. Their statements were subsequently used by the prosecution in the criminal trial against them. On appeal, this Court considered only the question of whether those statements were properly admissible as evidence against them in that criminal proceeding. The Court held that:

> . . . the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.

Id. at 500, 17 L.Ed.2d at 567.

The *Garrity* decision prohibited the use of coerced statements as evidence against a public employee in a criminal matter regarding his official duties. The Court, however, focused more directly on a public employer's right to know what his employees have done in performing their duties in two subsequent Opinions. *Gardner v. Broderick,* 392 U.S. 273, 20 L.Ed.2d 1082 (1968), analyzed the public employer's rights vis-a-vis its employee's right against self-incrimination. In that case, a New York City policeman was dismissed when he refused to *waive* his privilege against self-incrimination upon being summoned to appear before a Grand Jury investigating police bribery and corruption. On appeal, this Court reviewed the specific question of whether a State may discharge an employee for refusing to *waive* his Fifth Amendment rights. In its Opinion, this Court readily held that a coerced waiver of immunity unlawfully infringed on the patrolman's right against self-incrimination. *Id.*

In a companion decision to *Gardner, Uniformed Sanitation Men Assoc. v. Commissioner,* 392 U.S. 280, 20 L.Ed.2d 1089 (1968), this Court further described the unconstitutionality of dismissing employees for refusing to waive their right against self-incrimination. In that matter, public employees were similarly summoned to give testimony before a Grand Jury. At that time, they were asked to sign waivers of immunity, but refused to do so. On review, this Court stated that the employees were dismissed, not merely for refusing to answer questions regarding their conduct as public employees, but for refusing to waive their constitutional right against self-incrimination. *Id.* at 283, 20 L.Ed.2d at 1092. Again, this Court held that such a coercive waiver of immunity was unconstitutional. *Id.* at 285, 20 L.Ed.2d at 1093.

In both *Gardner, supra,* and *Uniformed Sanitation Men, supra,* this Court noted that an employee's refusal to answer questions specifically related to charges of misconduct, without a requirement that he waive his immunity against self-incrimination, could alone be sufficient reason for discharge from public employment. Specifically, in *Gardner* this Court noted that:

> If appellant, a police officer, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, *without* being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. New Jersey, supra,* the privilege against self-incrimination would not have been a bar to his dismissal.
>
> (Emphasis added).

Id. at 287, 20 L.Ed.2d at 1086-87.

Again, in *Uniformed Sanitation Men,* this Court held that:

> If [the State] had demanded that Petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment *without* requiring relinquishment of the benefit of the constitutional privilege [against self-incrimination], and if they had refused to do so, this case would be entirely different—[for] petitioners being public employees subject themselves to dismissal if they refuse to account for their performance of their public trust . . .
>
> (Emphasis added).

Id. at 284-85, 20 L.Ed.2d at 1093. *Accord, Lefkowitz v. Turley,* 414 U.S. 70, 38 L.Ed. 2d 274 (1973).

In its decision, the Third Circuit was fully cognizant of the restrictions under *Garrity* and the impermissible request under *Gardner,* that an employee waive his right against self-incrimination. At footnote 7, the Court correctly noted that in *Gardner* and *Garrity,* the public employers unlawfully trod on

their employees' constitutional rights by dismissing them for asserting that privilege. (Petitioners' Appendix A at 10a). However, such could not have been the case of Gniotek, et al., for Judge Broderick in his Opinion at the District Court found as a matter of fact that:

> ... there is nothing in this record indicating that the plaintiff officers were dismissed because they asserted their fifth amendment privilege. Seven of the nine plaintiff officers have stated in depositions that they do not believe that they were dismissed for asserting their fifth amendment privilege.
>
> (Petitioners' Appendix B at 23a).

In addition, the Notices of Intent to Dismiss stated only that the reasons for their dismissal related to the charges of bribery and other illegal conduct. (Petitioners' Appendix B at 47a-49a). Further, Judge Broderick noted that the Police Commissioner stated in deposition that Gniotek, et al. were terminated only because of the evidence of bribery. *Id.*

With no evidence in the record to show that plaintiffs were in fact discharged for asserting their Fifth Amendment privilege, and with no evidence that they were coerced into waiving that privilege, the Third Circuit correctly analyzed this matter as one in which Petitioners were unwilling to rebut the evidence offered at their E.A.D. interviews of their receipt of bribes. (Petitioners' Appendix A at 8a, 10a, n.7).

Though not arising in the context of employee relations or disciplinary hearings under *Loudermill,* this Court's Opinions in *Williams v. Florida, supra,* and *Rylander, supra,* state the important principle that the Fifth Amendment is not a substitute for concrete evidence in one's defense. In *Rylander, supra,* this Court specifically held that where a defendant has the burden of production with regard to his defense, a claim of privilege under the Fifth Amendment "is not a substitute for relevant evidence" to meet that burden. *Id.* at 761, 75 L.Ed.2d at 530-31.

Similarly, in *Williams v. Florida, supra,* this Court held that in the criminal context, a State law requiring that a

criminal defendant give notice to the prosecution of an alibi defense is not unconstitutional under the Fifth Amendment. This Court notably held that:

> . . . a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.

Id. at 84, 26 L.Ed.2d at 451.

Both *Williams v. Florida, supra,* and *Rylander, supra,* are consistent with the dicta of this Court in *Gardner* and *Uniformed Sanitation Men* that a public employer may dismiss an employee who refuses to answer to charges against him related to the performance of their official duties. *Gardner,* 392 U.S. at 278, 20 L.Ed.2d at 1086-87; *Uniformed Sanitation Men,* 392 U.S. 284-85, 20 L.Ed.2d at 1093. *Accord, Lefkowitz,* 414 U.S. at 84, 38 L.Ed.2d at 285-86. In the case of Gniotek, et al., each chose to remain silent and offer no rebuttal in the face of the heinous charges of bribery. With absolutely no rebuttal from their own lips regarding those charges, the City of Philadelphia had no choice but to discharge them from their duties.[6]

Furthermore, even if Petitioners were incorrectly given their *Miranda* rights in the context of their *Loudermill* opportunity to respond, their rights against self-incrimination were not abridged, for this Court's decisions in *Garrity,* and *Gardner,* stand for the clear proposition that any statements which they might have offered could *not* have been used against them in later criminal proceedings. Thus, immunity for statements which they might have offered to rebut the charges for bribery existed whether or not the City actually offered it. *See Hester v. City of Milledgeville,* 777 F.2d 1492 (11th Cir., 1985). Had Petitioners responded to save their jobs,

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6. As discussed above, Petitioners assert that the E.A.D. interview was not a *Loudermill* opportunity to respond, but a "custodial interrogation". However, as discussed *supra,* that issue was not raised before the Court of Appeals.

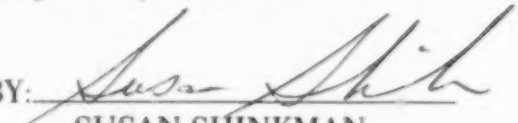
those statements could not have been used against them in any criminal proceeding. *Garrity, supra.*

Therefore, the Third Circuit did not carve an unlawful distinction between the instant matter and *Garrity* and *Rylander, supra.* Quite the contrary, the Third Circuit analyzed those decisions correctly by holding that Petitioners had the absolute right to remain silent in the face of the incriminating evidence of bribery brought against them. Their decision to remain silent resulted in them offering no evidence which could be weighed in their favor in the face of those serious charges of bribery. In that holding, the Third Circuit consistently and accurately construed this Court's precedent regarding the right against self-incrimination, *Garrity, supra,* the consequences of the failure to offer contrary evidence, *Williams v. Florida, United States v. Rylander,* and the authority of the public employer to terminate employees who fail to respond to evidence of misconduct, *Gardner, supra, Uniformed Sanitation Men, supra.* In view of the Third Circuit's well reasoned interpretations of this Court's Opinions, the instant Petition should be denied.

CONCLUSION

Therefore, because Petitioners have raised issues on appeal which they did not raise before the appellate court below, because they have proffered no evidence that the decision of the Third Circuit is inconsistent with other Circuit Courts, because the facts of this matter are too narrow to warrant broad review by this Court, and because the Third Circuit did not incorrectly apply this Court's prior decisions in *Garrity*, *Rylander* and *Williams v. Florida*, Respondents respectfully request the instant Petition for Writ for Certiorari be denied.

Respectfully submitted,

BY: 

SUSAN SHINKMAN
Divisional Deputy City Solicitor
Counsel for Respondents

JESSE MILAN, JR.
Chief Assistant City Solicitor

RALPH J. TETI
Chief Deputy City Solicitor

HANDSEL B. MINYARD
City Solicitor